LABOR IN ITS RELATIONS TO LAW

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BY

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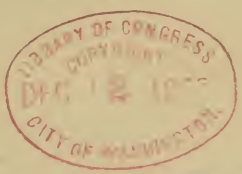

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LABOR IN ITS RELATIONS TO LAW

I

HISTORY OF THE LAW OF LABOR

Earliest Employment Relation was Slavery.

Logically, the simplest relation of employer and employee is that of slavery, and it is convenient, in sketching the history and tendency of this employment relation—certainly the second in importance of human relations—that this is so; for historically, also, it came first; the simplest came first.

The greatest ethical lesson of modern historical research has, I think, been to destroy the fiction of the Golden Age. For all classical writers refer to an actual time when all things were perfect, and whence humanity has deteriorated to modern faults and modern laws. Perhaps there is a survival of this classic tradition in the rhetoric of the modern demagogue, who usually assumes that mankind, and more specifically the growing gen-

eration, are naturally perfect, and would always seek the better reason were it free to them to choose. Unhappily, neither the age of gold nor the heart of gold is a reality. They are to be won by hard work, and by training of character, consciously directed; and the solace lies in this, that we have now put them in the future rather than the past.

The earliest and simplest relation, then, of human labor is that of slavery; and the conflicts of this day are nothing new, but are to be found in history, particularly in the history of our own race. Perhaps, even, we shall not find the remedies new, or new in principle, at least, though we may have better hope of them in our time than of old, now that the coarsest work is done for us by natural agencies, and humanity has, or should have, leisure for reason and kindliness.

Present Altruistic Tendency to Favor Labor.

The writings of Kidd and others are not necessary to tell us that the universal tendency among people who think to-day is one of allowance for presumption in favor of the laborer as against his employer. Possibly this is solely due to the fact that the great sins of the employer of labor are all past. As Herbert Spencer has pointed out, complaints only become audible when the serious danger of their cause has been removed. So, women

never complained of dependence until the law began to make them independent. But I think we are all glad of this fact — glad that our newspapers, our speakers, and our writers are easily led to take a side, where they can, for the cause of labor. The world has been organized always in the interest of the clever few. No greater interest lies in life to-day than how so to regulate it as to give the multitude their chance. I assume that we all come here predispositioned to that side. I shall frankly take that position in these lectures. But if we so put ourselves in the place of the laborer, or the laborer's friend, our first duty is clearly to see that no fault, no unfairness, no back-sliding into older, worse conditions be on our side. As the advocate of more equitable treatment for workingmen we should come into our court with clean hands. I say this at the start lest you should later think me over-scrupulous in showing where modern labor agencies are unjust, where they overstep the mark, where they restrict liberty— Anglo-Saxon liberty ; the kind that our race alone has won—and where they show a tendency to go back to the cruder remedies of earlier times, or to the less ennobling social order of inferior races.

Agricultural Labor Peculiar in its Conditions.

I shall not delay to speak of agricultural labor. The farmer and the husbandman have their own

problems to solve; they are affected by peculiar conditions, by necessary peculiarities in the ownership of the soil, the nature and proprietorship of the land, their raw material, being the land itself. So far as their conditions can be altered by anything we can do, they are benefited by the general advance of other laborers as they are injured by their general degradation. But the fact that the problems of agricultural labor are peculiar is shown as clearly in the latest statutes of our Western States—in Nebraska, for instance, whose drastic eight-hour law did not pretend to extend itself to the people on farms—as in the earliest known condition of things in England, where the villain was appendant to the land like a tree and could only be severed from it by death or sale. Still he was never a slave. It is important to remember this, as for a long time the contrary theory was maintained; but even the agricultural laborer was never a slave in England. There was a real bargain, says Thorold Rogers, between lord and serf. The serf may have had few rights of property, but he had more rights of person, and he was at least secure from dispossession. Although he was disabled from migrating to any other habitation than the manor of his settlement, and could not bear arms in the militia, he always could bear arms in the army of the king; and, so long as he stayed at home, his relation to the lord was a definite

contractual right, which might be commuted, and early was, into a small money payment, which is practically indistinguishable from rent for his land.

But Slavery never Existed Among Anglo-Saxons.

We start, then, here: Though slavery is the simplest labor relation, it has not existed, at least within historic times, in *our* race—a peculiar reason why we may claim England as the birthplace of modern industrial conditions. And if the agricultural laborer was not a slave, the artisan was still less so. No vestige, in the earliest times, of any servile relation can be found. Artisans were localized, it is true, because staying in one place was part of the general social condition of the time. The smith, the farrier, the two or three shepherds, the miller, later the carpenter, the tanner or shoemaker, later still the weaver and the baker, each belonged to one or, at most, to two or three neighboring communities, and served all indiscriminately for a fixed wage, paid at first by the day, later by the piece; and if the lord himself exacted his services and did not pay for the same with the rest, it was either a clear extortion (for we are here stating the facts, not denying that there grew up in the feudal baron a very definite notion of servile relation from his tenants to him) or supposed to be in commutation of rent.

Later attempts were indeed made—one in the time of Henry II., another in that of Elizabeth—on the part of the privileged classes to put the industrial laborer also into servile relation, and their chancellors naturally endeavored to justify the step by historic precedent; but I think I have stated the best modern opinion of the fact.

Earliest English Labor Relation One of Separate Contract.

We start, therefore, with our industrial laborer a free individual, and his relation one of separate contract with his employer. Such is substantially the letter of the law to-day. But the very latest definition I find in one of the very latest works on labor, published only last year, is, that the essence of the modern trade-union is "collective bargaining," that is, endeavoring to enforce a relation, not of separate and separable contract between the employers and each employee, between the lord and each peasant, but a contract between the employer, or the neighboring or related bodies of employers, and the workman, or a controlling force of the workmen organized into a trade-union. But thus far, also, we had progressed some eight hundred years ago—in the mediæval guild. The substantial distinction between the oldest form of guild and the modern trade-union would appear to be that the bond of the guild was

rather local, while that of the trade-union is the nature of the employment. Still, even in this particular, as we all know, the general guild of an English borough was soon differentiated into the separate guilds of the various crafts, arts, or mysteries which made up its industrial body politic. And again, just as the latest report of the British Royal Commission complains that the essence of trade-unionism is not solidarity, but protection of a special trade or part of it; so the essence of the mediæval guild was monopoly. Perhaps its earliest object was to prevent the employment of strangers, and our oldest law reports are full of cases of subtle by-laws and regulations which far surpass in complexity the restrictions of the narrowest trade-union or the most exclusive modern club. The Royal Commission's report just mentioned complains that when the representatives of the Amalgamated Society of Engineers spoke of the necessity of absorbing the unemployed, they announced their intention of putting further restrictions on the admission of apprentices to their trade. In other words, they contemplated not the employment of the unemployed, but their exclusion from the organization and industry of the Amalgamated Society of Engineers. Now, most of the things which seem to us to smack of slavery in mediæval regulations arise from this principle, which is really one of *privilege*. Membership in a

local guild was a *birthright.* It was, therefore, no such great unfairness, that a person who sought employment in some other town might be dragged back to his native field to labor, when it was thus artificially protected for him. This was the chief artificial regulation. Otherwise the relations of laborer and lord were left much to settle themselves, both sides relying on natural causes for the supply of laborers and of labor to be done. The lord could exact a fine from an absconding serf; on the other hand, the serf could not gain entrance in the guild of a town not his own until he had resided and worked in it for a year and a day. There was no attempt at the regulation of the price of labor ; but for some centuries matters went on in this way—a condition of affairs by no means so unlike that now recognized by law as were conditions which afterward happened in the sixteenth, or may now happen in the twentieth, century.

And the law never attempted to fix the price of the raw material ; but it did soon attempt to fix that part of the price of a necessary commodity which was determined by human agencies alone. And this would appear to have been the dangerous precedent.

The Statute of Laborers.

So matters went on until the middle of the fourteenth century, when was passed the Statute of

Laborers. Up to that time matters had gone on fairly well, and had adjusted themselves. The agricultural laborer got wages sufficient for his support, the artisan from two to three times as much, the clerk or scribe rather less than the artisan; nor were the hours of labor long. Thorold Rogers proves pretty conclusively that they were probably only eight hours a day, and the workman was paid extra for overtime. What brought this state of affairs to an end, and that in a purely fortuitous way, appears to have been the great plague, known as "the black death," in 1348. The first effect of this, of course, by vastly decreasing the supply of labor, was to double or treble wages. Prices in general went up, though not in the same proportion. The small farmer was little injured; but the large land-owner, the lord, or, as we should say, the capitalist, thought he was ruined. Then, with the bad example of the laws attempting to regulate prices before him, he induced, first, the king to issue a proclamation, that, despite the demand for labor, no higher than customary wages should be paid; and then, as this was necessarily disregarded, the Parliament passed the statute which remained a law until the fifth year of Queen Elizabeth, and contained eight clauses, of which, leaving out those which merely concerned the form of penalty, four concern us to-day. These four are, substantially:

1. No person under sixty, serf or free, shall decline to undertake farm labor at the wages that had been customary in the year 1347, except they were possessed of lands or private means or engaged in some mechanical or mercantile industry; the lord having the first claim to their labor, but those who declined to work either for him or for others could be sent to the common jail.

2. Artificers were made liable to the same conditions, and the artificers enumerated were saddlers, tanners, curriers, shoemakers, tailors, smiths, carpenters, masons, tilers, pargetters (plasterers), carters, and others. Doubtless they would have extended the law to operatives in the textile industries, but that at that time these were necessarily possessed of special skill, and their craft was enough of a "mystery" to lie outside of the care of the English privileged classes, it being mostly in the hands of Flemings or other foreigners.

3. That food must be sold at reasonable prices, and,

4. Alms-giving to able-bodied laborers was strictly forbidden.

Labor Compulsory.

It will be noted that there are three important principles in this statute: first, that of compulsory labor; second, the legal limitation of wages; and third, the prohibition of alms-giving, or chari-

table support. The first principle may have had some effect during the two or three centuries through which the law lasted; but Thorold Rogers tells us that the second principle—that of the regulation of wages—did not in practice work, but was commonly evaded, even in the case of agricultural laborers, where, from the nature of the case, it had most effect; and the third principle, that of forbidding alms-giving, was radically altered by the statute of Elizabeth, which founded the modern poor-law system of England, and which the nineteenth century has come to believe was the greatest of all agencies in the pauperization of English labor.[1] We will notice in passing that at this time—the fourteenth century—women were employed in field work, being paid at the rate of a penny a day, substantially less than the ordinary payment of male labor. Despite this Statute of Laborers, the ordinary wages of agricultural labor increased, in men's work about fifty per cent., while in women's work it was doubled. The peasants, says Thorold Rogers, *met the law by combinations;* or, in modern English, the serfs entered into what are now called trade-unions, and supported each other in resistance of

[1] See the monumental evidence of the effect of such state help, both on economic and moral conditions, contained in the voluminous report to the House of Commons in 1834, reprinted by special order in 1885.

the law and in demands for higher wages. Possibly as a consequence of this Statute of Laborers came the celebrated insurrection of Wat Tyler, as a result of which *all* the incidents of villainage were abolished, and *all* laborers declared free by the sovereign of England. It is noteworthy that Kent took the lead in this movement; "for there never have been serfs in Kent." To have been born in that county was a bar to the proceedings by which a lord claimed the recovery of his serf. Attempts were constantly made to enforce the Statute of Laborers by subsequent acts of Parliament; but, says Thorold Rogers, the fifteenth century was the golden age of the English laborer, if we are to interpret the wages which he earned by the cost of the necessaries of life. These efforts failed, and the rate kept steadily high, the wages of the artisan being generally sixpence a day, and the agricultural laborer fourpence; and women received from half to two-thirds as much. Wages were reduced a century later, under Henry VIII., by the indirect process of debasing the coinage; and by an attempt, partially successful, to suppress the guilds and confiscate their property, both the laborer's power of resistance and his benefit society were taken away.

Regulation of Wages Finally Successful Under Elizabeth.

Then came the statute of Elizabeth, which first successfully imposed a legal restraint upon wages, both in husbandry and in handicrafts, and this system was continued under legal sanction until 1812, and "by a sufficient understanding" for long after that date. All persons able to work as laborers or artisans, and not having independent means, were compelled to work upon the farms. The statute both fixed the hours of work and gave the justice power to fix the rate of wages. Agricultural labor was further depressed, and industrial labor somewhat protected, by that provision of the statute which prohibited anyone from exercising any trade, craft, or occupation then in use in England and Wales without first serving an apprenticeship of seven years. This part of the statute, passed in 1662, was not repealed until 1875. I shall postpone for the present any notice of those statutes which provided for the suppression of combinations among workmen for the raising of their wages, as this matter, belonging rather to the law of remedies, will come more naturally in a subsequent lecture upon strikes and boycotts; but will note here that in 1796 a statute fixed a day's work at twelve hours, with one hour for dinner, probably a longer day than was enacted three hundred years before.

General Review.

So much for general review of the history of English labor legislation, and it may be summarized in the statement that the rate of wages, originally left to natural laws, was attempted to be fixed by law during about three centuries, and a strict apprenticeship both required and limited; in other respects industrial labor was always free, and at liberty to seek employment where it would, subject only to the limitations of place, which were imposed by natural custom or by the system of residence in corporate guilds and to the limitations, or the protection, as to rates and employment which were furnished, in the interest of the laborer or handicraftsman, by his own trade-guilds; and since about 1812 it has been free in all respects, even as to wages and prices. There are thus (but separated by no clear demarcation) four stages—serf-relation, guild control, state control, and free contract.

Modern Factory, etc., Legislation.

Nothing in a world of uncertainty can, however, remain crudely logical. The perfect system of *laissez-faire* hardly lasted a generation when, for an aggregation of labor, it gave way to the principle of the factory acts. These began about 1804; and if not strange, it is suggestive, that the culminating statute, the ten-hour law of 1847,

signalized, with the same rejoicings on the part of the laboring world, a return to the same principle of privilege or state control that had been abolished by the laboring world amid bonfires and bell-ringing in the Paris of 1791, just fifty years before; the only difference being that the older system controlled prices, not conditions; the renewal controlled conditions and not prices.

It was doubtless the modern factory which brought about the change. The increased proportion of capital to labor in production, but still more the necessary localization, with its attendant evils, was making the mill-hands villeins appendant to the factory as truly as in early times there had been villeins appendant to the land. The conditions of child-labor and woman-labor, in particular, were rapidly becoming intolerable. Practically as unable to leave the factory as the villeins to leave the manor, the tyranny was as insufferable, their conditions of health and morality infinitely worse. Adam Smith himself foresaw that before the evils of this artificial condition the logic of *laissez-faire* would have to yield. The factory acts passed up to 1847 were rapidly copied in the manufacturing States of this country. And substantially all the principles of our later legislation were first embodied in these statutes passed in England during the early years of the reign of Victoria. It may be well to get a gen-

eral view of these in the time remaining for this lecture, leaving out only the law directly relating to the labor contract to be the main subject of the next.

Eight-hour Laws.

First, let us consider the hours of labor. It may be generally stated that no attempt has yet been made by legislation in England or America to prescribe for how long a period of each day, in general occupations, a man twenty-one years old shall work. I have noted that by the early custom of England only eight hours was probably considered a full day, and first by statute in the early part of this century it was fixed at twelve, which statute, if not inoperative, was soon repealed. In England to-day there is great disagreement, both among employers and among laborers, as to the advisability of a general eight-hour law. There are now said to be six million non-unionist workers, and only one million trade-unionists, up to date, in England; the six million non-unionists do not demand any system of industrial regulation of hours of labor whatever, nor even do all the trade-unionists. Many of the trades complain that neither employer nor employed could exist under any system of regulations that prevented them from making up in good times for their losses incurred in periods of depression.

Perhaps, however, the bulk of trade-unionists have, in England, accepted the principle of depriving the individual of his full freedom of contract in settling his hours of labor, and they partly justify by the plea that such freedom is irrevocably lost already; inasmuch as modern business establishments can be conducted only on the basis of uniformity in the men's hours of labor with the women's and children's which are so regulated; and the chief remaining objection in the trade-unions to the government fixing the hours of labor comes only in those trades which are directly subject to foreign competition.

In the United States.

In this country the tendency has not gone so far. We shall speak of women and children in a moment; but for full-grown men there is no effort, so far as I know, nor has any general statute yet been passed, which prescribes how long they shall work.

The Legislature of Massachusetts passed a resolution this year instructing its Commissioners on Uniformity of Law to introduce a recommendation at the next meeting of the National Conference of such Commissions from all the States, to consider whether by voluntary action the legal hours of labor in the several States of the Union might not well be made the same. But it is doubtful whether

this resolution was not meant primarily to apply only to the usual statute affecting the labor of women and children, or to the statute prescribing how long a day's labor shall be, *in the absence* of express contract. The nearest law passed by any State in this country to a general regulation of the hours of labor was that of the State of Nebraska, passed in 1891, which provided that eight hours should constitute a legal day's labor for all classes of mechanics, servants, and laborers, except those engaged in domestic or agricultural labor. Even this statute did not prohibit contracts for a longer day, but required double rates for such overtime; and the statute itself has been declared unconstitutional by the Supreme Court of Nebraska in a decision rendered a few months ago.

Constitutionality of such Laws.

Whether such statutes impose such a limitation upon personal freedom as to be unconstitutional under the inherited principles of the Anglo-Saxon race, or even perhaps under our written constitutions, is one of the most interesting questions now in the public mind, which we shall consider more fully when we come to speak specifically of the labor contract itself.

Exceptions.

Going on now with our general view, the next thing to note is that we do find a number of statutes

which prescribe what shall be the length of a day's labor in the absence of express contract to the contrary, and also the entering wedge of the attempt to regulate labor through principles of State socialism in limiting the time of labor done for the State, or for a town, or municipality, or any contractor of public work. Thus, in the absence of contract, eight States have limited the hours of labor to eight hours per day, and six to ten hours. The laws of Illinois also provide for an eight-hour day, but expressly state that overtime work for extra compensation may be contracted for. In New Jersey a week's work may not exceed fifty-five hours. This is as far as any of our States have yet gone in the direction of limiting general labor of full-grown men; but several States, and the United States law, limit hours of labor done for the State or on public work to eight hours, and Massachusetts and Texas to nine.

Regulation of Wages.

No regulation whatever as to price has yet been attempted in this country, or is attempted in modern times in England, with the solitary exception that Massachusetts provides that cities shall pay laborers a rate not exceeding $2 a day; and, as is doubtless familiar to you, many of our towns and cities fix a rate—usually $2—by ordinance, that is, by voluntary municipal contract,

not by general law. There is undoubtedly a strong tendency in this country to fix all public work at a rate somewhat higher than the market demands, usually $2 a day; and in England to require all public employers to give what is called a living wage; but so far the tendency has not become the fact. Indeed, the report of the last English Labor Commission shows that the employees of public works are paid, if anything, rather *less* than the average rate outside, which difference, it is said, is made up to the workmen by greater certainty of employment.

Women-and-Children Eight-hour Laws.

When we come to women and children, we find a great difference. Undoubtedly, this distinction rests on the theory that both women and children are wards of the State, the old theory being that women were not fully citizens, and might be, therefore, the subject of special protection. Substantially half the States in this country have a provision that women and children, in factories or workshops at least, may not be allowed to work more than eight hours a day, this being the law in Illinois and Wisconsin, or ten hours a day in New England, New York, and the Northern and Central States, or in any case more than forty-eight or fifty-eight hours a week, respectively. This statute was sustained in Massachusetts some

years ago on the express ground that it was a proper police regulation; but probably really on the theory that I have adverted to, that women and children might constitutionally be protected in making their own contracts. In Illinois, on the other hand, within a few weeks, the law as to women has been declared wholly unconstitutional on the ground that the modern theory is that a woman is a citizen, and that as such she has the same right as a man has to make her own contracts. This is certainly the logical modern view, and it will be curious to see which view will generally prevail throughout the United States.

Unconstitutional in States where Women Vote.

It is at least very clear that in those States which have adopted woman suffrage, there will be no longer any constitutional justification for thus artificially protecting woman from making such contract as she deems most advantageous to herself. Clearly, to do so will be to put her at a disadvantage in industrial competition with men, which disadvantage, however slight in effect, will afford a pretext for retaining her present low rate of wages, or perhaps for insisting on making it lower still. Therefore, in woman-suffrage States, any limitation thus imposed on the hours of labor of women will have to be imposed also on men; and as our courts now stand, it is pretty clear that

they will permit this, if at all, only in the case of labor employed by corporations; and if this exception were generally made, it would put corporations at such a disadvantage that they would probably turn themselves into private trusts for the purpose of evading the law, and this could probably be easily done. We may, therefore, expect a check by the courts to the recent movement for statute regulation of labor hours.

As to Children.

The labor of children is also covered by this statute, and further, it is common to provide that children between the ages of twelve and fourteen and eighteen shall not be employed in such a way as to wholly prevent or interfere with their common-school education. Under the ages of eleven or twelve they may not usually be employed at all in factories, and in most of our States not at all in mines. The present state of English statute law is somewhat similar. A child between the age of fourteen and eighteen is there termed a "young person," and may be employed under certain restrictions, while a child—meaning a person under the age of fourteen—has to pass a certain standard of education; and under the age of eleven no child may be employed in factories at all. It will be noted that all these acts concerning the labor of women and children com-

monly apply to factories and workshops, not always to domestic labor, even that of sweat-shops, and not to simple domestic labor or agricultural labor at all. In fact, it may be noted here that agricultural labor is very generally unprotected by law in any respect whatever, just as its output is not protected by the tariff.

Special Occupations.

There are a few statutes in this country specially regulating hours of labor in certain occupations, such as railroads, street railways, and stationary engines; but these are perhaps imposed as much for the protection of the public as for that of the laborer, and the hours are usually long, being commonly twelve hours a day upon railroads, and limiting the length of continuous runs at an even greater period of time, provided a night's rest is given between. For the safety of others, special restrictions are also imposed on the employment of children in certain employments, such as running elevators, or cleaning machinery, and children are very generally prohibited, in the interests of their own morals, from being employed in dramatic exhibitions, etc., under a certain age.

Legislation for Women.

Of special labor legislation for the protection of women, other than that concerning hours of labor,

there is as yet very little. There is an almost universal statute that women in mills, offices, and shops shall be provided with seats. In California and Louisiana the employment of women was forbidden in houses where liquor was sold at retail; but the California court, following the modern view of women citizenship, declared this law unconstitutional. Illinois, California, and Washington have adopted statutes, and the same thing is in the California constitution, that no person shall be precluded or debarred from any occupation, profession, or employment, except military, on account of sex; but the Illinois statute adds that this shall not be construed as requiring any female to work on streets or to serve on juries. These statutes, however, merely enunciate the general law. So far as I know, there is no restriction upon women in any State of the Union going into any employment or avocation whatever, unless the employment be in the nature of a political office, such as justice of the peace or member of the bar; and in many States the bar has already been thrown open to them. Upon this subject there is much cry and little wool.

How far this universal employment of women in factories and workshops away from their homes is an unmixed good, may seriously be questioned. It is probably quite too late to alter it in the case of factories, at least until our economic condition

becomes so much improved as to make it unnecessary; but in England there is a strong feeling against it, as it tends to lower the wages of the men and make it necessary for all women to work. It is easy to see that in the case of married women, for instance, if none of them worked, none of them would have to; but the moment one goes to the factory, the other wives have to do the same if their social condition is to remain equal to that of their neighbors. In the case of unmarried women, their competition is both more necessary for some and less necessary for others. Undoubtedly, unmarried women having no other means of support should be allowed perfect liberty of labor at any industry. But there is a large class of unmarried women, like the daughters of operatives, who have homes of their own, and simply work for the sake of spending-money. It is this class whose competition may be most dreaded by others. Women, too, have hitherto manifested much less ability in defending their rights, and much less tendency to join hands with trade-unions. In Connecticut, last year, a bill was actually introduced forbidding married women to work in factories, and the English reports are full of arguments against it, drawn from the inferior condition of homes presided over by such women, and the failing health of children. It can hardly be that such a law as the Connecticut bill would

be wise, as it would obviously put a premium on immorality by enabling a man and his mistress to earn double as much as a man and his wife. But the whole question of the effect upon the social order of the unification of the functions of men and women, economically, has not yet been seriously considered, much less proved.

Times of Payment.

As to the times of payment, many of our States have adopted laws requiring laborers to be paid weekly or fortnightly, though this statute is much more general in the case of corporations, for the reason that it is of doubtful constitutionality as applied to private employers. Indeed, the Supreme Courts of Missouri and Arkansas have expressly so declared. The Supreme Court of Massachusetts, on the other hand, has just instructed the Legislature that such a law would not be unconstitutional in that State, even although applied to private individuals.

Truck Acts.

In a still greater number of States there is a law that labor can only be paid for in lawful money, or at least in checks or orders redeemable in lawful money, and not in truck or in orders upon companies' stores, etc.; and in some States it is made illegal for employers of labor to keep

stores for the purpose of supplying their employees, or at least to sell them goods at higher rates than to the general public, or to require them to trade at such stores. This Truck Act also finds its precedent in an English statute.

Industrial Labor Specially Privileged.

It will already have been noticed that industrial laborers as a class are specially protected by our law, for there is no statute limiting the time during which a farm-hand or servant is required to work, and few concerning mercantile employees and shop-girls. We must look fairly at what has been done, and must recognize that there is even danger, from the tendency to which I adverted at the beginning, that industrial laborers should come in this country to regard themselves as a class specially privileged.

Labor Debts Preferred.

And we now come to a body of statutes where this is even more evident. Debts for labor services are specially recognized and protected in all the States of the Union. Laborers commonly have a preferred claim upon the assets of an insolvent corporation, or even of an insolvent individual, or the insolvent estate of a person deceased. By the statutes of some States the stockholders of corporations are individually liable for

all debts for labor done for the corporation of which they hold stock, and there is, as you know, a most elaborate body of laws giving mechanics and laborers liens on the product of their work. And, furthermore, this money due for wages or paid for wages is specially protected to the laborer and his family in the laws of many States. It cannot be attached or held back by suit against the employer. Sometimes this is true, as by the constitution of Texas, to any amount; but more usually the amount so protected to the laborer or his family is limited to one or two hundred dollars, or to wages owed for thirty, sixty, and ninety days. And by the constitution of Virginia, and the laws of Michigan, Kansas, and Nebraska, no property, although exempt upon legal proceedings for an ordinary debt, may be held by its owner as against a claim for labor or personal services. And in New York State no property is exempt from execution upon judgments obtained by any female employee or servant, nor court fees required or stay of execution granted. And the same principle has been adopted in Michigan, Iowa, and Virginia.

A few new State constitutions have expressed, in more or less glittering generalities, a special claim also that labor has upon the law-making body of the State. Thus, by the constitutions of Pennsylvania, Texas, and Louisiana, the Legislature

may not pass any local or special law regulating labor, trade, manufacturing, mining, or agriculture. By the constitution of Wyoming, the rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his services, and to promote the industrial welfare of the State.

Political Privileges of Laborers.

The political protection of the laborer is beginning to be seen to. Thus, in Minnesota, employers are forbidden to require as a condition to employment the surrender of any right of citizenship, or, in Wyoming, to discharge candidates because of their nomination for an office. In all the States the laws provide for giving time to employees to vote. In New York the employer may not use pay envelopes upon which is written or printed any political argument, and in all the States it is a criminal offence for a person to endeavor to influence a laborer's vote by threats of discharge or lower wages. Some of the States prohibit the employment of aliens upon public works, and refuse to enforce contracts made for alien labor in foreign countries. On the other hand, the Grand Army of the Republic is being made, in many States, a privileged class, being especially exempted from all civil-service examinations, or even from other tests of fitness; as in the

State of Massachusetts, which has just passed the worst existing law on this subject over the veto of its governor.

Relief Funds.

Some of the States are beginning to prohibit the institution by employers of charitable funds or benevolent societies, of which the employee is obliged to become a member. The elaborate relief system of the Chicago, Burlington & Quincy Railroad, which has been in successful operation for many years, and accumulated a relief fund running, I think, to more than a million of dollars, has almost been nullified by a court decision to that effect. When we consider that the great desire of English laborers is for insurance against accident by the employer, it would seem as if this position were rather extreme, although, even in England, it is admitted that what the employee wants is protection from injury, not compensation, for the reason that compensation, when furnished, as it ultimately is, by funds of this sort, and still more when furnished by outside insurance companies, tends to make the employer careless both in the choice of his workmen and the maintenance of his machinery. In Tennessee there is a law aimed against company doctors.

Prison Labor.

The tendency to prohibit all prison labor, or, at least, all prison labor which can possibly come into competition with outside labor, is familiar to all of us. Mr. Ruskin, it may be remembered, made a cardinal principle of his Utopia that all disagreeable, heavy, and dangerous work should be done by criminals, and we may think that this is another instance where the zeal of the labor leader has carried him too far. The Southern States very generally permit prison labor in important public works, on roads and canals. A condemned criminal is the only modern instance of the industrial slave, and remembering that the pyramids of Egypt were built by such labor, it does not seem as if our sentimental altruism should carry us so far as to object to the employment of our criminals in healthy outside work, particularly such as, however valuable to the State, will not probably be built by private enterprise; such work, for instance, as the Cape Cod Ship Canal.

Labor Exempted from Trust Laws.

But perhaps the most noteworthy instance of the special privilege granted laborers is that of the statute of Michigan passed in 1889—a stringent law against trusts, which specially excepts all contracts and combinations relating to the services of laborers or artisans who are formed into societies

or organizations for the benefit and protection of their members. In other words, you may have a trust in labor, or even, as it seems, in the product of labor, though a necessary of life, provided only it is formed by the laborer himself, even under a co-operative charter, and not by the capitalist.

Factory Regulation in the United States.

Our factory legislation is not yet as full and complete as that of England, though it may be observed that, owing to our written constitutions, our Legislatures are perhaps a degree more shy in imposing regulations and restrictions upon individual employers. We have, however, in the North, laws for the general inspection and regulation of factories against over-crowding, for providing good air, freeing mill-rooms from dust or noxious vapors, requiring mechanical fans, fire-escapes, ventilators, mechanical belt-shifters, communication by bells and tubes between ordinary rooms and machinery rooms, requiring doors to open outward, elevator shafts to be fenced in, and so on through an endless number. There is one statute alone, in the State of Washington, which provides for the sobriety and capability of the operatives employed. Mines and railroads are also a subject of most elaborate regulation, and in the last two years, I am happy to say, a much more neglected matter has been taken up—that of sweatshops.

Sweatshops.

A sweatshop, in legal parlance, is a workroom either in one of the ordinary domestic rooms of a house or in a tenement not under the control of the person furnishing the employment. Here, of course, we strike again a constitutional objection, "that an Englishman's house is his castle;" and a New York law prohibiting, under certain conditions, the manufacture of cigars and confectionery in tenements has been declared unconstitutional by the Court of Appeals in that State. New York, New Jersey, Massachusetts, and Illinois have, however, passed statutes providing for the regulation and inspection of tenements where industrial work is done, and I think we may say that there is little doubt that such legislation will ultimately be sustained under the doctrine of the *police jurisdiction* of the legislature, though it is possible that the New York statute went too far. Intelligence offices are also beginning to be regulated by statute, and even the amount of their charges limited. Generally, throughout the country, the common law is changed by which employers were not made liable for accidents resulting from the negligence of a fellow employee of the person injured, so that the distinct tendency is toward making each employer the insurer of all his workmen against any accident occurring on his premises, or to a person injured about his work.

Knights of Labor, etc.

Finally we may say that there are general statutes giving legal recognition to Knights of Labor, Farmers' Alliance, mutual or provident associations, workingmen's aid societies, and labor organizations generally. In fact, the Legislatures have gone as far as they can in inviting workmen to incorporate themselves into legally recognized trades-unions, and have given them full powers and all reasonable privilege in so doing. The great difficulty has been, however, to persuade the workmen to take advantage of these laws.

Union Labor not to be Discharged.

Statutes are being rapidly passed which forbid employers from discharging employees for joining labor-unions, or from requiring as a condition of employment that they should not be members of such unions, or even from voluntarily awarding a preference in employment to non-union men. I must say, however, that I have not yet found any reported case where the constitutionality at least of this later prohibition has been fully argued and clearly maintained; and in one State—Missouri—it has just been denied, and the law nullified. It is pretty clear that until we get into actual State socialism, the individual employer must be left free to employ whom he will. In other words, as long as the principle of labor em-

ployment still remains a voluntary contract, it must be a contract and must be voluntary. Union labels, however, may be protected, and all other encouragement afforded to union men. There were cases, some years ago, where courts refused to protect the label of a trade-union on union-made goods, for the reason that, being employees, not manufacturers, they had no property right in the same; and in consequence of these very cases the States have been rapidly passing statutes allowing union labels to be registered much as a patent or trade-mark is registered, and granting the same remedies for the use of the same by unauthorized parties, by injunction or suit for damages. Such laws now exist in more than half the States.

Strikes and Blacklists.

Finally, there is quite a mass of new legislation aimed generally either in the direction of legalizing strikes and trade combinations or in that of prohibiting combinations by employers, blacklists, and lockouts. These, however, will be best considered in a lecture specially devoted to them.

Arbitration—Collective Bargaining.

And there are, as you know, many important steps already made in our legislation in the direction of providing tribunals for conciliation and

arbitration; for realizing, in other words, that principle which I spoke of in the beginning as enunciated by the latest labor agitations in England, that the relation of employer and employee should cease to be that of individual and contract, but rather of the nature, if not of trade-partnership, at least of "collective bargaining" on both sides —a principle which will necessarily bring in an entirely new body of legal remedies for actions which contravene this modern notion of the solidarity of labor interests.

I think it will be admitted that our American democracies have already not shown themselves deaf to the demands and complaints of the industrial laborer. Certainly they have gone very far in the direction of removing abuse and of limiting and regulating the employer in the management of his business. All this may, however, be called negative achievement. I wish it were not possible, as it is, to close this summary view of the present state of things by stating in so few words the sum of positive achievement in the direction either of improving the character and efficiency of the laborer or of furnishing new fields for the unemployed; but when we say that our laws of apprenticeship have become a dead letter, and that provision is made in some half-dozen States for industrial training or the teaching of manual arts in the public schools, and, in New York, for

free lectures to working people on actual science in the evenings, we have said about all I have gleaned from my reading the statutes.

The Massachusetts Commission-on-Unemployed Bill for Labor Colony.

The Massachusetts Commission on the Unemployed presented in their report this year an elaborate bill for the establishment of a labor test to discriminate ordinary vagrants from persons out of work, and for the establishment of a labor colony, to which the latter might be committed voluntarily or by order of court, if the occasion justified. The notion of the labor colony was of an institution not punitory or penal so that commitment to it would be attended with any disgrace, but which, having a large tract of unimproved land, should develop it agriculturally and industrially, and in so doing give any men out of work, who might otherwise be in danger of becoming tramps or criminals, such training in ordinary farming and the common industrial trades as would enable them upon their discharge to seek skilled work with good probability of obtaining it. This bill will not be acted upon by the Legislature until next year, if it will at all. It will be interesting to see whether it meets with opposition or help from the societies of organized labor.

Tendency of Legislation and Courts Favorable to Labor.

It has been necessary to cover a large field in this lecture to give even an outline sketch of the history of English labor questions, as treated by Legislatures and the law up to date. We are now prepared to take up the more concrete subjects which are pressing for immediate solution, but I think we must admit after making this review that the industrial laborer to-day has succeeded in getting the ear of the public and of the Legislatures. He has a common and regrettable notion that the courts are against him. It is true that timid judges have sometimes flown to the Constitution, much as a child runs to its mother, and that angry judges have invoked the aid of armed deputies in enforcing equity processes, which otherwise would have been of no effect; but in many cases the occasion justified it, and, at all events, the Legislatures have not been slow to help the cause of labor. While asking the earnest attention and sympathy of all thoughtful men, the industrial laborer must not be led to believe that he belongs to a privileged class, and certainly the statutes recently passed have gone far to justify such an impression in his mind. No other American citizen has his contracts regulated by the State, his times of payment fixed, his liberty to break them secured by law, his property freed from judgment, while upon the property of his debtors he

is given a prior lien. In no other occupation than that of personal labor is a man left free to perform his own contracts or not, while the other side is held to them. No other class have their prosperity made specially the subject of legislative consideration, and their political power carefully guarded by express statute, and every opportunity given for its use. When he has a just grievance the public bears good-naturedly the inconvenience caused even by the most sudden and arbitrary action on his part. Let us recognize then that however evil were the conditions in the past, the law has done much for the laboring man to-day and is ready, backed by public sentiment, to do more, provided only that what he asks is limited to that which is reasonable, possible, and not inconsistent with our inherited liberties.

II

THE EMPLOYMENT CONTRACT

Two Public Questions Concerning Labor Prominent To-day.

Our last lecture attempted to give a bird's-eye view of the general subject of labor in its relation to law, sufficient to enable us now to pick out what are the important points, the key-positions, in the country we have surveyed ; and I may say at once that they appear to be two in number: First, the general question of the labor contract, and how far the law shall restrain, modify, or amend it ; second, the question of the acts and remedies permissible both to employers and employees in their effort to better their position relative to each other, and how far the State shall restrain, sanction, or enforce these.

The Labor Contract, its History.

I think to-day it will be quite enough if we endeavor to consider the labor contract. Now, first I wish to call your attention to the fact that it is now generally admitted by radicals as well as

conservatives, that the great story of the historical development of the labor question has been that from artificial control to freedom of contract. I do not wish to prejudice you with any notion that this freedom of contract is now, or in the future, necessarily, a thing to be preserved; but it is necessary for us to note this great historical fact.

State Control Asked.

Many labor leaders are again asking for an effectual control of the labor contract or relation, and this not only as it was controlled in old times in the interest of the laborer, by the guilds, that is, not now by trades-unions or combined action alone, but by the direct legislation of the State. That is, they wish to substitute the will of a presumable majority, or at least of a majority of those persons who for any year happen to be members of the State legislature, for the individual judgment of the citizen. They wish to prohibit the right of the employee to make his own contract with the employer, and this not alone separately, but as applied to what we have called collective bargaining; that is, even to the contracts of all employers in a given trade with all the employees in such trade embodied in a labor union. I repeat that I do not now wish to consider whether this is wise or not, whether it is beneficial to the employee or not, whether on the

whole it is for the greatest good of the greatest number or not; but I do wish strongly to point out that this is a distinct change of sides and a surrender of the ground for which labor had been fighting from the earliest historic times down to a very few years ago. On this fact every one is agreed. It is as clearly set forth in the compilation of labor history made under the auspices of Mr. Powderly as it is in Adam Smith, as clearly in the history of Brentano of Leipsic—who represents the later German school, which objects to Adam Smith and the *laissez-faire* idea—as in Thorold Rogers. Brentano is most emphatic on this point, and his phrase for it is, "the growth of labor from the system of *authority* to the system of *contract*." Brentano himself is for the yet newer view, which he terms "association;" but the history of his own subject, as told by himself up to the date of his book, is simply the history of the successful effort of labor to be relieved of compulsion by law or by guild, and its arrival at the stage known to us in the nineteenth century, where—to quote Brentano's words—"labor is regarded as a commodity to be sold, and the greatest possible liberty, both of individual bargaining and of combination, is given to the laborer in selling it." On August 4, 1789, as Brentano tells us, the abolition of the old guild control in France was welcomed by laborers with the wildest rejoicings

of the French Revolution, and "the glorious night of this 4th of August, under the shouts of approval of the nation, made good the demands of the laboring classes for the freedom of individuals as against absolutism, and for the abstinence from every positive encroachment upon the economic life of a positive economic legislation."

Turning again to England, the triumph is there further accentuated as the crowning principle of the Anglo-Saxon Constitution. I say Anglo-Saxon, because as both Blackstone and Benjamin Franklin have pointed out, it was this Constitution that we brought with us into this country as our most priceless heritage; and Bushrod Washington, one of our first great judges, asserted, that this, with other unwritten constitutional principles, was so deep and so sacred as not to be prejudiced even by its omission from the written constitutions which our States and our national government had at that time adopted. Therefore, in England, and still more in America—for here, by the framework of our government, our legislatures do not have the power of the British parliament—this is not only a hard-won principle of the relations of laborer to employer, but a fundamental principle of the relation of the freeman to the government. You will see, therefore, that while we still say nothing as to the expediency of starting again on the old Elizabethan method of

regulating the labor contract by statute—only now avowedly in the interest of labor, while then it was virtually in the interest of capital—we do say a great deal upon the constitutionality and the novelty in our country and in our race of starting on this course.

Meaning of the Constitution.

Now I am very well aware of the savor of dryness and musty precedent which in every mind not a lawyer's hangs about the phrase "constitutionality or unconstitutionality." It is within a very few months that a friend with whom I was engaged in drafting some legislation in the interest of labor, a learned professor and a publicist as well, used the phrase, "but bother the Constitution!" more than half-a-dozen times in connection with one brief statute that we were trying to draw. He said "every time you try to do something for labor or humanity you run up against the Constitution." Nevertheless, I would beg all people who are considering this question in the interest of labor; in the interest of humanity; at least, in the interest of a free humanity, to get a full understanding of what this dry phrase, "unconstitutional," may really mean. There is a notion lately prevalent, particularly among certain newspapers and a minor order of politicians, that the will of the majority is in all things para-

mount; that the object of a free government is simply to ascertain, register, and enforce the will of any majority at any time. Now, we must most earnestly deny this; deny it to the length of saying that such a government, far from being a free government, would only differ from a mob government in a certain possible avoidance of blows and bloodshed; and we would go so far as to assert the paradoxical opposite, namely, that the object of all free government, certainly of all constitutional free government, is not to enforce the will of the majority, but to protect the liberties of the minority; the majority, except in a tyranny, enforce their will fast enough under any government—with their fists without a government. Such is the object of a constitution; and that is what the phrase "constitutional" may mean. There is one greater interest than even labor or property; a higher idea than daily meat and bread, and that is, freedom; and the seemingly dry phrase "unconstitutional" can in most cases be translated into a synonym more easy of comprehension to all Americans, and that is, "destructive of liberty."

"We live in a world of ideas," and if through the Hebrew race came a greater idea still, no one will contest that through our race has come the idea, liberty. Since the time of King John we have been fighting for this, and we have got it;

and this liberty includes, even by the dry intendment of law, the right of a man, first, to be free in his person; second, the right to be free in his thoughts; and third, the right to be free in his actions. I have stated this somewhat in the order of its historical accomplishment. As we all know, first an Englishman's body became free; then came religious liberty, and last of all, and peculiarly through the labor question, his freedom to work or not to work; his freedom to work for whom he would, and when and at what, and for what pay he would.

Personal Liberty Includes Property.

But one thing remains to be added to this before we can come to a concrete treatment of our subject, and that is, that it very soon and very early became a part of a man's personal liberty that he could acquire, possess, and freely enjoy material possessions. Now, again, I am not taking here an ethical ground in defence. For the moment, I am not defending the question of private property at all; but I am merely pointing out that as a man's freedom of person only would be like that of the beast of the field, without a roof to creep to at night and protect his wife and children, and a store of food and fuel to feed and warm them with until he could acquire the next supply, this institution of property was at once the

necessary instrument, as it were, of personal freedom itself. It is perfectly possible, of course, that these things can be provided by the State; but property—appropriation by somebody to each person of certain commodities—is a necessary part of the liberty of a human being. The maxim, that an "Englishman's house is his castle," is but one expression of this truth. Now we are still living under the institution of private, as distinguished from common, property, and private property is expressly made a corner-stone of every one of our State constitutions and of that of the National government itself. And, in theory, all constitutional liberties are equally important, for the reason that if you can destroy one, even though by a law, you can destroy them all. This is why I say that the object of a constitutional government is to protect minorities; that is, to protect a minority, or even a single individual, in the enjoyment of any constitutional thing it was specified by his forefathers he should have when they entered into the compact which makes him a member of the government. Thus, while democratic government has, as one function, the registering of the will of the majority, constitutional government has as its special function the seeing to it that the majority does not transcend certain cardinal principles of freedom or policy which were specially excepted out of its powers by the will of the people

itself. Should the will of the people be really and permanently changed by such a decided majority as to guarantee that the change will be permanent and not a mere chance vote in a moment of excitement, the Constitution itself provides a method for registering such change. Therefore we approach this subject with the most distinct statement that the freedom of the individual, and freedom in dealing with his possessions, of which his own right to labor is as much one as his horse or his cow, is our greatest birthright, and one which has received the sanction of what is called the Constitution.

Now, in considering these labor questions, particularly in their relation to this principle, there are always two questions to be determined. First, is it expedient to do this thing by a law? second, is it constitutional? If both, there can be no question; but if expedient, and not constitutional, the clear answer we should give is that it should then be brought about by voluntary action, by united demand, by public sentiment, so that we may get the benefit of the change proposed without paying for it the dear price of losing, once and for all, all our constitutional liberties. I wish to make it clear that I believe our phrase, "constitutional," to embody one of the very highest ethical principles; certainly so in relation to our people and our race. I deny most

strenuously that it is a dry phrase or a legal figment. I say that whenever the word "constitutional" can fairly come in, we are treating with the deepest principles and the most ethical motives. And one word more before we go into practical affairs. The difficulty in this question is based almost entirely on another and a peculiar point. There is, of course, the general difficulty that a concise expression of great human import necessarily cannot define its application; when, for instance, we say that a man's property cannot be taken away without due process of law, there is at once the question whether the property of a man in his own labor comes under the general expression of property.

Written or Unwritten Constitution.

But I mean further than this. The constitution of England is avowedly unwritten, and if Webster and Judge Washington—who rendered almost the first decision on the subject—were right, we have not lost it by adopting our written constitutions. If, on the other hand, the view is correct that more recently has been expressed by the Supreme Court of Massachusetts, that we have no unwritten or implied constitution, but that each man is protected and restrained only (1) by the exact words of his own State constitution, and (2) by the express provisions of the United

States Constitution, the uncertainty is still not quite removed, because there can hardly be a doubt that the concise expressions and general phrases employed in our brief State and National Constitution were written with conscious reference to all that body of unwritten constitutional law which they had brought with them from England and under which our citizens then lived; and, therefore, the expressed restrictions and guarantees of our written Constitution, wherever the phrase fairly permits it or indicates it, are to be extended to include by implication the whole body of constitutional law which then fell naturally into the same subject matter. This is the sole cause of the apparent diversity of our courts on constitutional matters. There is never any doubt when a law or an act in question falls under the express written phrases; but when the express written phrase is a general one, the question is whether it includes the particular. Whether the right to property includes property in a man's own labor is precisely an example of what I mean; and examples of cases which, though clearly constitutional principles, are not embodied in our written Constitution, are not hard to find. Parliament in England is said to be supreme, but there is a very early case, which has been referred to in a thousand cases since, to the effect that even Parliament cannot make a man a

judge in his own case; so even Parliament cannot arbitrarily take the property of one man and give it to another. Now, I will say frankly that I have very great doubt whether the omission of our State or National Constitution to express such principles as this has taken them out of our birthright as Anglo-American freemen.

So in the case of monopolies. In the leading case on this question, that of the Norwich Gas Light Company, arising in Connecticut in the year 1856, the court expressly says that "although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, providing that no man or set of men are entitled to exclusive public emoluments or privileges from the community, to render them void."

Present Entire Freedom of Labor Contract.

Coming now to a practical consideration of the labor contract, I hope I have shown that we start upon a simple and intelligible proposition that to-day the labor contract is perfectly free; either side may make whatever contract he can get the other side to sign. Not only this, but either side may freely combine to demand any form of contract from the other side, as mere combinations alone are now made perfectly legal.

This is the condition of affairs we now are in, and this is the condition of affairs for which laborers have always for five hundred years contended for. It has been so fully and completely realized that it hardly appears in any of our laws or constitutions; for, subject only to certain laws against combinations, against collective bargaining, which will be peculiarly the subject of my next lecture, this state of affairs had practically come about before the adoption of our written constitutions. The men who formed our constitutions thought it no more necessary to provide that a man might make a legal contract about his own labor than they did about his property, and no more necessary to say it about both than they did to say, in terms, that there should be no taxation without representation. Only in view of late attempts to interfere with this contract have certain States very recently affirmed the principle. Thus, the statute of Louisiana of 1890 provides that the violation of labor contracts and wilful interference with such contracts by persons not parties thereto is forbidden. You will note that this important statute falls into two branches—one which asserts the legality of labor contracts specially and forbids their violation, and one which forbids wilful interference with such contracts by persons not parties to them; that is, intimidation. The first branch alone concerns the contract itself.

The California code says that the contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of another or a third person. You will observe that this is mere definition. The statute clearly does not consider it necessary to say in terms that such a contract is legal. Of course it is. Now, this fact that only one State—and that by a most recent statute—says anything about the general question of the labor contract, is the very fact which shows how completely such a contract had become, not only legal, but guaranteed by the Constitution. It did not require the support of any statute. The Louisiana statute was doubtless passed by the Legislature in a moment of apprehension about first principles, caused by the general strike and disorder of the city of New Orleans in 1889. The California statute is not so significant, because it is merely a part of Mr. David Dudley Field's code, and Mr. Field put everything in his code, almost to the alphabet and the tables of arithmetic. Our law-making, therefore, bears out my statement that the right of contract in labor matters is recognized in this country as needing not the sanction of any statute. If it be not involved in our written constitutions, it is, at least, a part of that unwritten constitutional law of which I just spoke. From

the point of view of history, of law, and of ethics, this general principle is clearly right. The contract of labor should be free to both sides.

Thus, in People *v.* Gillson (109 N. Y., 339), the court says: The term "liberty" as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.

In Braceville Coal Company *v.* The People (147 Ill., 71), the court says:

"Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property, preserved by the Constitution, is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which

the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." In the *Frorer* case we said: "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract, and quoted with approval: 'The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large, would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.'" (*Cooley's Const. Lim.*, 393.)

Intimidation.

As a direct corollary to this, the other branch of the Louisiana statute should also go without saying, as the law is thus in all our States. The contract

being free to the parties, no third person should interfere with them, at least by any other influence than persuasion. This, I think, we will also take as axiomatic. But, unhappily, laborers, often uninstructed, and suffering perhaps under past oppression or present unfair treatment, have so often broken this principle, that here we find that States have found it necessary to legislate; and so every New England State, New York, Indiana, Illinois, Wisconsin, Minnesota, Missouri, Oregon, the Dakotas, Montana, Georgia, Alabama, and Texas, have thought proper to legislate that it shall be a criminal offence for any person to prevent, or to seek to prevent, by means of threats, intimidation, or force, alone or in combination with others, any person from entering into or continuing in the employment of any other person. Illinois, Oregon, the Dakotas, Montana, and Georgia have also extended this principle to the employer; that is, it is criminal to intimidate or coerce any employer not to employ any other person whom he might otherwise be willing to employ. The other States have probably not covered the point because they did not deem the employer likely to be intimated in so doing.

"Molesting."

I will here pause to note that in England the same legislation has run its course, and the

phrase in their present statute now is, "anyone who uses violence to, or intimidates, such person;" and it is very significant that the majority of the Labor Commission of 1893 recommend an amendment to this wording, which is found in a statute of 1875, to read to follows: "any person who uses or threatens to use *violence* to such other person." You see that there is a most important distinction here. The word "intimidate" may well cover moral intimidation. The labor leaders are now contending to be permitted this, and to limit the prohibition to violence or the threat of violence; that is, physical violence alone. I presume, however, this physical violence would apply to destruction of property as well as injury to person. This is a very significant change, because it has arisen out of the great strikes in England and the law cases to which they gave rise. I shall have to go into this matter in some detail when we speak of boycotts, merely noting here that one of our leading decisions in the State of New York recognizes that there may be a moral intimidation—ridicule, for instance, or disorderly shouting, or objectionable epithets—which will be criminal, even when practised by one person alone. In a boycott, which is necessarily the act of more than one person, the law is much stricter.

New York, Minnesota, Georgia, and Montana have been a shade more specific, and expressed

that this intimidation shall not be either by interfering with tools or property or the use thereof.

But we have not yet got to the end of this interesting legislation. In Connecticut, New York, and Montana the prohibition of the statute extends to the preventing, by threats or force, any person from doing or not doing any act which such person has a legal right to do. Here, you will see, you have the broad human principle laid down, that I have a right as an individual to do an act not otherwise unlawful, and any other person shall be regarded as a criminal who attempts to prevent me. It sounds almost like a passage from Herbert Spencer; but who, after this, can say there are no ethics in the law world?

Oregon and North Dakota, following the last English statute, specify more particularly against the compelling another "to alter his mode of carrying on business, or to limit or increase the number of persons employed by him, or their rate of wages or term of service." Michigan has a similar statute, and, finally, the brand-new constitution of North Dakota embodies this corner-stone as follows: "Every citizen of this State shall be free to obtain employment wherever possible, and every person maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment from any other person, shall be deemed guilty of a misde-

meanor." There you have the property right in labor laid down in an express constitution.

No Limitation of Wages.

So much for the general principle of the contract and its safeguards. Now for particulars and restrictions. In the first place as to wages: No Anglo-Saxon community, so far as I can find, in modern times, has prescribed or restricted the rate of wages paid. And by a decision of the Supreme Court of Massachusetts the ancient law regulating wages and apprentices is expressly declared to be no part of our common law. The constitution of Louisiana expressly says that the Legislature shall never fix the rate of wages.

Perhaps the nearest effort to regulating wages was that law of the State of Massachusetts, passed in 1892, which prohibited the deduction of wages of weavers when any special piece of work was imperfect, even to the point of worthlessness, and for the employer to impose a fine therefor. This being an attempt to make a man pay for what he had not got, the Supreme Court of Massachusetts itself (which perhaps goes as far as any court of the Union to-day in sustaining new laws, and most narrowly interprets old constitutional principles) declared this law unconstitutional. As a consequence of this, the next Legislature passed a law contenting themselves with ordering that

where a deduction was made for imperfect work, the imperfection should be pointed out to the workmen at the time; which is certainly a reasonable provision, so that no one has thought worth while to question it.

There is one other statute somewhat similar to this, that in Ohio, passed in the same year, which prohibits any reduction or retaining of wages for materials, tools, or machinery destroyed or damaged. It may not, perhaps, be clear to others than lawyers why I think that this statute is perfectly valid and the Massachusetts one not. But the reason is, that the Massachusetts statute definitely took away a property right, while this one of Ohio merely provides that a separate and independent claim for damage to property cannot be fixed by one party to the contract, and set off against a claim of the other party of a wholly different nature, that is, a claim for or against a contract claim for wages.

Anti-Truck Acts.

There have been, however, many statutes copying the precedent of the English Truck Act, passed about fifty years ago, requiring employees to be paid only in lawful money, or at least in checks which were expressly redeemable in lawful money. You are all aware how this act was passed, that it was levelled at the abuse which existed in keep-

ing company stores and forcing employees both to buy their own goods at possibly exorbitant prices of the employer and to remain in his debt permanently, so that they were practically under his control. Now, this is a very interesting question to debate on constitutional grounds, for it is surely a very good example of a law that we all believe in. It is clearly both wise and expedient, and one which removes great abuses we all know to have existed. Nevertheless I must point out that the courts of Pennsylvania and West Virginia, in most vigorous opinions, since approved in many of the Western States, have declared this law unconstitutional on the ground that a full-grown American citizen has a right voluntarily to make a contract to accept groceries instead of money if he chooses. The West Virginia judge thought that the right to contract in respect of property, including contracts for labor, was *property* protected by the Constitution ; while the decision in Missouri went more particularly on the ground that this statute, which there applied only to mining laborers, was unconstitutional under that provision of the Missouri constitution which forbids class legislation. There have been recent decisions in England, where the judges from the bench have stated that there is an unwritten principle, that an English citizen was free to make any contract, neither criminal nor immoral, and the

courts would enforce it. Now, both these principles—that of freedom of contract and that denying class legislation or legislation applying to particular persons only—are only limited, but they *are* limited, in our country, by one other doctrine which may be regarded as an unwritten constitutional exception to this constitutional doctrine, and that is known as the "police power." This is that doctrine by which the Legislature, that is, a majority of people acting through its representatives, can prohibit certain acts, or regulate certain private relations, for the purpose of securing the moral and physical health of the people. The Western court, in passing on this Anti-Truck Act, said: "Under pretence of this power the Legislature cannot prohibit harmless acts which do not concern the health, safety, and welfare of society." I am willing to accept this definition; but is this truck contract a harmless act? Labor experience has shown it to be a very harmful act; an act leading to great fraud and abuse. It seems to me, therefore, that these Southern and Western courts, despite their excellent motives and the stirring rhetoric in which they announce their decision, might well have considered this money-payment matter a fair one for police regulation; particularly just because the need of the law was only for certain trades, as the mining industry, for instance, which is necessarily remote from

markets, and where many of the employees are an ignorant class, with little knowledge of affairs. Sailors have been the subject of similar protection for the same reason from time immemorial. But we must hurry on.

Weekly Payments.

After rate and medium of payment, we naturally come to time of payment. Many of our States have recently been passing laws requiring employers of labor to pay wages weekly, fortnightly, or monthly, and to pay in full the whole amount that may be due up to a few days before. Some of the States limit this restriction to corporation employers, for the express object of meeting the constitutional objection. For our States can indirectly compel corporations to do a great many things which it might not be constitutional for them to require of individuals; for the reason that all corporations are the creature of the State, and if they refuse to obey such orders, their charter is simply taken away. But some States have declared these weekly payment laws to be unconstitutional, even as to corporations; and in every State where the question has arisen in a court of last resort, weekly payment laws applying to individuals have been declared unconstitutional, with the exception only of Massachusetts.

Such Laws Constitutional in Massachusetts.

The Massachusetts constitution is the oldest and in some respects the most peculiar that we find in any State. In olden times the people of the colony of Massachusetts Bay and of Plymouth had made and submitted to a vast amount of sumptuary regulation of life. It had been prescribed by law what they should eat, drink, and wear, and how long they should work; and it had also, of course, been prescribed by law what they should pay for their work. Now, there was nothing peculiar in this at that time, because this was done while the statutes of Elizabeth were still in force in England. Therefore, to my mind, it is no argument that because the primitive status of authority justified a thing in the seventeenth century, it should, with us, be cited as a constitutional precedent to justify the same in the nineteenth. There is, however, one provision in that State constitution which is found in no other State, and it is upon this principle that its Supreme Court based their late instruction to the the Legislature, declaring that a weekly payment law applying to all persons in that State would be legal. That provision is contained in the article of the Massachusetts constitution concerning the legislative branch of government, and says that "the Legislature may make all manner of wholesome and reasonable orders, laws and ordinances,

directions and instructions, either with penalties or without, as they shall judge to be for the good and welfare of this country, so as the same be not repugnant or contrary to *this* constitution." You see that this wording raises the question whether it has not expressly abolished the unwritten constitution; that is, whether the Massachusetts constitution has not expressly given its Legislature power to do anything not contrary to its exact words, although it would be unconstitutional at common law; and the Supreme Court of Massachusetts at present rather inclines to this view. The exact point we are discussing seems unimportant. If I hire a clerk by the month at a salary large enough to make it quite easy for him to wait a month for his pay, and we both desire it, it certainly seems an interference with our liberty that we should not make such a contract, though it could not be said that either side were deprived of an important liberty by the restriction. This, therefore, is an example of a case which, possibly expedient, certainly entirely unobjectionable, may nevertheless be unconstitutional; and, if so, we should proceed cautiously. This, at least, in all States except Massachusetts.

Expediency of Such Laws.

Now, there may be some practical justification for refusing to consider these laws constitutional.

In so holding, the Illinois court says: "It was suggested, in the interest of employees and employers as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories and workshops to be open and operated with less present expenditure of money. Public economists and leaders in the interests of labor suggested and advised this course. In this State and under this law no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the State might do. The corporations would be prohibited from entering into such a contract, and if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs and the residue of his wages when the product of his labor could be sold. The employees would, by the act, be practically under guardianship; their contracts voidable as if they were minors; their right to freely contract for, and to receive the benefit of, their labor, as others might

do, denied them." These wise words will show how dangerous it is to regulate human action by law even when a Legislature may foresee nothing but good from the restriction.

Screen Laws.

Their are certain provisions as to the measuring of wages that have become the subject of much debate; for instance, that miners should be paid for each ton of coal mined, and the tons weighed fairly under official inspection at the mine. Most States have declared this law unconstitutional. The Illinois decision says it is unconstitutional on the ground that the employer and employee have the clear right to contract for a wage at so much per day, if they choose, and not by the ton. And so far as the decisions rest on this principle they are unquestionable. But apparently some of them go further and set aside a law which merely provides for the method of weighing the coal when the miner is paid for it by the ton. But this again would seem a fair subject of police regulation, and therefore constitutional enough.

Substantially, therefore, we see that wages in modern times have not been regulated by law, nor, doubtless, is it expedient to do so; and in our country most of the statutes which attempt to regulate the time, method, and conditions of paying them have been declared to be such restrictions on

personal liberty as to be unconstitutional when regarded as laws made by the State. Of course it is always to be borne in mind that this says nothing as to their expediency, or as to the propriety of labor unions or other combinations insisting on such regulations, and public sympathy and newspaper support going with them.

Eight- and Ten-Hour Laws.

The next question in importance to rate of wages is, of course, that of length of a day's work. This was substantially covered in my first lecture, and I will merely repeat the two principles, that on the one hand our constitution—that is our principles of liberty—demand that a man should be allowed to work as long as he likes ; and it is at least doubtful whether even from the most selfish point of view of the labor interest this principle is not desirable. It is the province of labor itself, through its unions, to prescribe what contract for length of time it shall make rather than to risk the cast-iron limitation of the State. From the English Labor Report of 1893, it appears that many of the labor unions were opposed to the eight-hour law on the ground that it would not permit them to make up for the lean years by working over-time in the prosperous years. And, on the other hand, we have established the principle that the State may constitutionally and wisely regulate the hours

of persons not fully citizens, and so unable to protect themselves; that is, of women and children; and the factory laws regulating only the hours of women and children have, since their adoption some fifty years ago, practically determined the length of the day for men as well. To this sympathetic determination there is, of course, no constitutional objection. But, again, in these years of woman suffrage, and under the modern view that a woman is as fully competent to protect herself as a man is, it is extremely difficult, logically, to sustain the eight-hour law as to women; and such a law has, in fact, been annulled in Illinois, and may be in other States, with the exception of Massachusetts, where it has been definitely sustained. Several cases where the laborer himself desired to work more than eight hours a day are now on their way up to the Supreme Court of the United States. Mr. Edward Atkinson has proposed to test the question in this way: Suppose half a dozen middle aged, intelligent, unmarried women, perfectly competent to look after themselves, who are engaged in some skilled manufacturing labor requiring only a little power, were to rent an electric wire, have it brought into their own dwelling, and proceed to weave and spin in their own house, although working under a factory and getting pay from it; suppose they chose to work fourteen hours a day, if they liked—as

many a woman now does work about her ordinary domestic avocations—would the court sustain an officer coming in and arresting them as having committed a criminal offence in so doing? And if the courts of Massachusetts would sustain such a conviction, would public sentiment do so? I confess I have great doubt. In New York, under a statute requiring the city of Buffalo to employ laborers only eight hours, and requiring contractors with that city to follow the same rule under penalty of a misdemeanor, the superintendent of a respectable corporation has been convicted of a misdemeanor for allowing some of his men to work ten hours; and the case is now on its way to the Supreme Court of the United States. On the other hand, there is a case in California directly counter to this. The city of Sacramento passed an ordinance that nobody working for the city should work more than eight hours or employ Chinese labor. The latter part was not material to the case, but a contractor who allowed his men to work more than eight hours was indicted in the same manner as in the New York case. And the court, with some indignation, held that such a law, while invalid even in a civil suit, was outrageously so when it made a person not a city officer who violated it guilty of a criminal offence.

Labor not a "Commodity."

Thus we have attempted to show the historical growth and the present importance of the great principle that the labor contract, more than all contracts, should be free on both sides. The law is certainly not slow in endeavoring to help the laborer where it can. In fact, I think we may fairly state that the industrial laborer at least is beginning to be a privileged class in the law. While all our constitutions demand that no man or set of men should have special privileges from the community, I think you will agree with me that the many laws I have mentioned go quite a little way in giving to the industrial laborer, at least, advantages and protections which the ordinary citizen does not have. But I must hasten to add why I think there is no objection to this. The theory that labor is property, and that the laborer is like anybody else having property to sell, is misleading, unless we at the same time recognize that while he has goods to sell, they are goods of a very peculiar nature, being, to wit, himself, his time, and his energies. By the assumption of the case, he has no other wares, no other capital. By the assumption of the case, he must sell; he cannot wait for a market. The seller of any other goods, by the very fact that he has them to sell, has some capital upon which he can live while he is trying to make a satisfactory contract. Take the sim-

plest case of all for instance—that of a farm girl who goes to market to sell eggs; if she cannot get any decent price for the eggs, she can at least live upon them while waiting for the market to improve; but the seller of labor, and above all, of specialized factory labor, the weaver or the laster, who can turn his energies to nothing else, whose physique does not probably permit him to become an ordinary day-laborer, the creature of modern complex industrial conditions, is peculiarly at a disadvantage when his market fails him. Called into being by a complex social system, he has an ethical right to demand that the social system which has so narrowed his use shall provide him with reasonable opportunity to exercise it. That is the ethical ground upon which this favoring of the industrial laborer must be sustained, and the ground upon which we may hope not only that it will be sustained, but will be much increased, generally through the labor contract itself, by action of trades-unions and enlightened employers, but sometimes, where it is necessary, by legislative act, provided only that such acts are not destructive of the principles of liberty under which we live.

"The Contract System."

There has been a tendency of late—it seems to me, a mistaken one—on the part of labor and its

sympathizers to object to any form of express contract with the employers. It seems to me that this is a most lamentable step backward. A part of the best hope of the laborer lies that way. The most important practical case so far arising is that provision, of common use by employers for a very long time, which seeks to protect them against a capricious or malignant desertion of the work on the part of the laborer, by the penalty clause, a week's or a month's notice, a forfeiture of wages. This reminds me that in speaking of the special privileges accorded the seller of labor by modern law and custom, I might have noted as perhaps the most important of all, that the labor contract is the only one which one party is practically free to break, and the other left without remedy. The seller of any other kind of goods must perform his contract, and the buyer has an ample remedy for his failure to do so. A man who contracts to build a house cannot put up four walls, and then leave it without a roof and demand proportionate pay; but a man who contracts to sell his labor, although it be for the completion of a complicated piece of goods requiring long time, may, individually, stop work at any time, and the employer has no remedy. Even when a special contract is made for a month or a year, the employer has practically no remedy, for the laborer, having only labor, is not responsible as a capital-

ist, and for all time our law has refused to enforce the specific performance of the labor contract.

Only in two English-speaking communities, so far as I know, has there been any modern law aimed at giving the employer a remedy for violation of the labor contract. First and most important, is the recent English statute under which, in certain employments, there is a summary process for the sudden and unexcused refusal of a laborer to perform his work; he may be brought before a magistrate and sentenced to a small fine and brief imprisonment. The other case is in South Carolina and Arkansas, where contracts for farm-labor may be put in writing and witnessed, stating the length of time or what particular crop the laborer is to raise and gather, and what and how he is to be paid, whether by money or shares in the crop, and, in such case, when a contract is thus formally made, if the laborer abandons the contract without good cause, in Arkansas he forfeits all his wages due; in South Carolina he is guilty of a misdemeanor; and so also in Louisiana, in case he has received goods, as, for instance, seeds or agricultural implements, upon faith of the contract. These are the only efforts at enforcing individual labor contracts by modern statute. Of course, when we come to a collective breach of contract done by combination or conspiracy, and particularly when done for the purpose of injuring

the employer, we get into the common law of strikes and boycotts, which is a very different thing. But individually, the contracting laborer is allowed to break his contract without a penalty; and can never be forced to perform it, as all other contractors of any kind may be.

It was, therefore, not only natural but reasonable that employers should require some notice, and in the case of industrial labor it has commonly been a modest demand—one week or two weeks. Nevertheless this notice has been much objected to; statutes have already been introduced in some States making it illegal, and the Knights of Labor generally are, I understand, in favor of prohibiting it. The State of Massachusetts, for instance, passed a law providing that where an employer required such notice from his employees, the employees should be entitled to the same notice from the employer. This is certainly fair enough. But this year a statute was passed going a little further. Whereas the first law provided that the employer might discharge a laborer in case of a general strike, or for incapacity or misconduct, without giving the laborer such notice, a statute approved March 16th last has forbidden this, so that now a Massachusetts employer who requires a two weeks' notice of intention to leave from his employees cannot discharge a laborer who, for instance, is drunk, or who wilfully destroys a machine,

without paying him two weeks' wages in advance. Still, even this is a trifling matter ; and so far no State has passed a statute forbidding employers and employees to make any contract other than the ordinary indefinite verbal one. Nevertheless, a strong effort is being made to bring such a change about. In the Haverhill strike last winter, the avowed ground was the institution of the contract system, so called. Now, the contract made or imposed upon their employees by the Haverhill employers against whom the strike was called was a very bad one ; notably the so-called "apprentice contract," where the employers went back to the old dodge first introduced by employers in the time of Queen Elizabeth, by which the bulk of their work was done for a mere pittance by a continual succession of so-called apprentices ; the only difference between Haverhill and Elizabethan England being that the Haverhill contract did limit the apprentice employment and pay to three years, while under the statute of Elizabeth it could run to seven. This contract, I say, was a cleverly devised method of paying labor an unfair price under a misleading inducement that at some indefinite future time they would get a bonus, or, at least, be employed at a full rate. As a matter of fact, when that time came, as the employees claimed, they were commonly discharged entirely. But granting that this

was a most iniquitous contract, I would urge that the Haverhill strikers and their sympathizers, and labor sympathizers in other cases, will make a great mistake if they attack the general use of fair and clearly defined contracts rather than limiting their attack to the bad contract offered in any particular case. The question of strikes among railway men and telegraph operators, for instance, can hardly be solved without it. I believe that in a fair and clearly expressed contract, of which both sides shall have a copy, and with whose provisions they shall be familiar, lies one of the hopes of improving the present labor situation. The indefiniteness of the labor contract has been a curse to both sides, and particularly to the employee. By all means, there should be mutuality ; and the trades-union should see to this. If they cannot it may be necessary to risk a statute requiring it. But, as in the recognition of the laborer as a citizen, free to contract, capable of acquiring contractual rights, has been his great emancipation of the past ; so, I believe, in the extension of the contract idea, in the recognition of the collective contract, combination bargaining on both sides, will be the great emancipation of the future.

III

STRIKES AND BOYCOTTS

The Law of Conspiracy.

The subject we come to to-day, to a student of ethics, is perhaps the most interesting in the whole domain of law, for it is the only branch of the law—certainly the only branch of civil law as distinct from criminal—where a higher principle is enforced than mere legality, where the law itself undertakes to go into the higher domains of morality and ethical purpose. We shall find, even in the law of strikes, but clearly and avowedly when we come to the law of boycotts, that there are two great points in which this law differs from all other legal regulations. First, that it undertakes to judge men and their conduct as the recording angel might judge them, independent of any overt act ; and second, that it undertakes to judge not alone what men do, but their intention and purpose in doing it. Now, first I want to clear away a confusion which still exists in the books of most writers, but is an inheritance from that obsolete Elizabethan law of which I have

so often spoken. You will find still in many text-books, and in some cases, the assertion that there cannot be such a thing as a legal strike. In fact, the very latest published text-book on the subject —that of Cogley, published in Washington in only 1893—declares all strikes illegal, for the reason that they are necessarily done by prearrangement between many workmen to cease working simultaneously for the express purpose of injuring the employer. Now, this statement is not the law to-day, and it is not the law, because the last clause, that all strikes are for the express purpose of injuring the employer, is not true. The explanation of the survival of this notion is that under the statute of Elizabeth, so often quoted, and other old English statutes, it was illegal to pay wages beyond the amount limited by law, and as a consequence of this a combination to enforce such higher rate of wages was necessarily a combination with an illegal purpose. Upon this ground was the old Journeymen Tailors' case decided in England in 1721, which in effect made all strikes or labor unions to raise wages a conspiracy; and that was the law in England down to the beginning of this century; but it was never fully adopted in this country.

Strikes not Illegal in the United States.

The cases in New York, Pennsylvania, and Massachusetts decided early in this century

show an ever bolder intention to distinguish the Journeymen Tailors' case; so that it was soon established—certainly before the year 1830—that a strike, even when it is a preconcerted agreement to leave employment, in the absence of any breach of express contract, is not a conspiracy which subjected the striker either to civil or criminal liability. Doubtless this tendency of our courts, while it rested morally upon general considerations of humanity, rested legally on the ground that they held the old English labor statutes never to have become part of the Common Law in this country. But whatever be the reason, such is the fact; and a strike, merely as a strike, to raise wages without other motive, was never illegal in this country. And in England they soon arrived at the same result, but by another method. There an express statute had to be passed. There are several such statutes, but they may be said to date from the year 1824. In that year an act was passed providing that no workmen entering into a combination to advance wages or lessen working time shall be subject to prosecution for conspiracy, or any criminal punishment. Now, this act also provided that no combination to induce another to depart from his service before the time for which he is hired, or to induce him to refuse to enter into work, or to force the employer to carry on his business in a certain way, should be

an illegal conspiracy. This, as we shall see in a moment, was going too far; and the next year that part of the statute was repealed; but the repealing statute still provided that it should not be penal for laborers to combine for the *sole* purpose of determining the rate of wages or the hours of work, or to enter into an agreement among themselves for the purpose of fixing such wages or hours; and in the course of the next twenty years the legality of all trades-unions was fully established in England. As I said, they were, in my opinion, never illegal in this country.

Intention the Test.

But we shall be asked, if all strikes are legal, how is it then that even last year certain strikes were declared illegal, and certain people who ordered them or took part in them were actually punished? This brings us to that interesting law of conspiracy which I spoke of in the beginning; and I first ask you to note, that when I said all strikes were legal, I did not say that a combination not only or not chiefly to raise wages, but mainly to injure property, or some definite person, that is, what we now call a boycott, was legal. A naked boycott, a boycott having for its sole purpose the injury of some definite person or class of persons, or the destruction of some definite property, has never been legal either in Eng-

land or America, and it is not legal to-day. This is one of the oldest doctrines in the law, dating back to 1221, when the Abbot of Lilleshall complained that the bailiffs of Shrewsbury "did him many injuries *against his liberty*" in that they caused proclamation in the town that none should sell to him or his men under penalty of ten shillings. Why is this? Why is a combination to strike legal and a combination to boycott not? The sole answer is that the intention is different. Here the law makes—in some cases the intention, in others the purpose—the sole distinction. There is no dry letter of law about this doctrine; it punishes or inflicts with damages the offender as a parent might punish a child, not for what he did do, but for what he meant to do, and for the object he had in doing it. The law of conspiracy may be stated most concisely, that a criminal conspiracy, or a conspiracy which subjects the partaker either to criminal punishment or to damages to the person injured, is either (1) a combination to do an illegal or immoral thing, or to injure a definite person or class of persons, or the public generally, whether the means employed be legal or not, and although the thing sought or the act done would not, in the case of a single person, subject him to any liability; or (2) it is a combination to do a perfectly legal thing by means which are, or any one of which is, criminal or illegal; and in both cases

the thing punished is the *combination* to do to others as you would not have them do to you, and not any single act; nor, indeed, does it need any act whatever to make the combining persons liable in damages, or even subject to the criminal law. You will see what broad ethical ground we have entered upon here. Here are two ethical points novel in the law: First, that it is enough if the object be immoral or wrong—it need not be illegal; second, that the intention is made criminal even without the act. As you well know, in the case of single persons the law does not go into intentions or evil dispositions at all, when no wrongful act has been done. More than this, it is the common reproach of the law that it takes no cognizance of acts which may be most wrongful, most immoral, when they do not come within the definite proscription of the law. An individual by himself, as every melodrama tells us, may ruin another, may ruin him even with malice aforethought, without the laws interfering to prevent it in the least degree. He may spend his life in malevolence to some other person, and yet go unpunished on this earth. It is a stock reproach of the law that it suffers this. But what I want to emphasize is the fact that in this doctrine of conspiracy the law has undertaken to do all that the moralist, perhaps even all the sentimentalist, would have it do. Now, before rejecting

this vast body of law (the only province in which the law has endeavored to be simply moral, to look solely at the purpose, to judge and prevent those acts which, not technically unlawful, are yet unjust or ruinous to others), we should scrutinize most carefully the position the law takes, for if it be a necessity to do away with this high attitude, it is certainly a regrettable one.

Morality of Trade Combinations Considered in the Law.

The legal reasons advanced by judges and text-writers for thus going into the domain of morality are often different. Perhaps unnecessarily shy of seeming to enforce the golden rule, judges commonly say, for instance, that the reason why the law will punish or restrain a combination of a number of people to injure a definite person in the absence of any overt act, is the very much greater power that a malevolent disposition has to hurt another, when it is shared by many people and artificially fomented among them. One manufacturer may hate another personally; may wish him ill in his business. Of that evil intent the law can take no cognizance; but when a dozen other manufacturers, perhaps in the same trade, get together, and upon a common basis of hate for this manufacturer, and such malevolence is the real purpose of the combination, then, even though they have done nothing, the law says a combina-

tion of this kind gains such strength by the very fact of its being a combination that we will restrain and punish it without any regard to what acts they may have committed. In the first branch of conspiracy, therefore, that kind of conspiracy which seeks to attain an unlawful or immoral purpose or a definite injury to a third person, there is no question of acts at all; only in the other branch of conspiracy, that to do a thing which may be legal and moral by illegal acts, does the question of the act become material; and in that case it is held that the act of one member of the combination is the act of all, if it naturally followed from what they undertook to do.

Boycotts.

The general American law upon boycotts will be found stated in two cases, one in Vermont, the other in Ohio. Thus, in the case which arose in Ohio, a bricklayers' union declared a boycott against Parker Brothers, who were contracting bricklayers, first, to get paid a fine imposed upon one of their employees who was a member of the union, and, second, to reinstate one apprentice who had left them and make them discharge another. Parker Brothers refused. The union declared a boycott against them, and designated one of the defendants, P. H. McElroy, to enforce it, and paid him a salary of twenty-seven dollars a

week and his expenses for so doing. McElroy continued in the work a number of months, and issued a circular to all material men, including Moors & Co., the plaintiffs, stating that Parker Brothers were discriminating against the union, and calling upon them to withdraw their patronage from Parker Brothers, and announcing that any firm dealing in building materials who ignores this request is hereby notified that "we will not work his material upon any building, nor for any contractor by whom we are employed." This was signed "By order Bricklayers' Union, No. 1." The plaintiffs, who were a firm selling large quantities of lime to the building trade, received one of these circulars, and did stop sending lime to Parker Brothers by delivery, but Parker Brothers sent a teamster who bought it for cash at the plaintiffs' cars. McElroy, discovering this, sent to all the plaintiffs' customers and probable customers a circular stating that members of the Bricklayers' Union will not use materials supplied by Moors & Co. and four other dealers, the effect of which circular was to interfere with Moors & Co.'s business, and to cause a loss of customers who feared a similar fate. Judge Taft, in a most carefully written decision, held, in the first place, that the declarations made to Moors & Co. by those of their customers who withdrew their custom, made

at the time they did so, that it was for fear of the boycott, were competent evidence in the case; and then, the court went on to say: "Generally speaking, if in the exercise of the right by one to carry on his business or bestow his labor in his own way, another suffers a loss, he has no ground of action, there being no legal injury; but in the exercise of common rights which result in a mutual interference and loss, such loss is a legal injury or not, according to the intent with which it has been caused, and the presence or absence of malice in the person causing it. Here the acts were done expressly to inflict loss upon the plaintiffs, and such loss resulted. If they were malicious they were actionable. When intentional and wilful acts are committed, calculated to cause damage to a person in his lawful business, and done with the unlawful purpose of causing such damage without right or justifiable cause, and such actual damage does occur, the person injured may sue any person committing such act; or in case there be a number combining for that purpose, the persons may be indicted for the conspiracy, even without showing any actual damage to the person or the persons against whom it is aimed."

But to my mind the most instructive case on the whole subject is the Vermont case of State *v.* Stewart, decided in 1887. This was an indictment for a conspiracy to hinder the Ryegate

Granite Works from employing certain granite cutters, who as a matter of fact were not unionists, and to hinder and deter them from accepting employment in the Ryegate Works, the real object being, by such injury to the company and threats or insult to the men, to deter them from working, and so compel it to conform to the regulations of the National Stone-cutters' Union. The court held that a conspiracy to interfere with the lawful prosecution of the industry of a third person, as well as to control the free use by workmen themselves of their own labor for such persons as they pleased, was a criminal conspiracy both by the common law of England and that of Vermont, and said: "The boycott is not the remedy to adjust the differences between capital and labor."

Conflict of Opinions on Boycotting.

This boycott question is the very latest development of labor law, and is not yet authoritatively settled, throughout this country at least. On the surface the decisions appear to conflict; but I believe that the statement I have made is an approximation of what the law is going to settle down to. Certainly, it is the only principle upon which any attempt can be made to reconcile the boycott cases. Thus, in a New York case, on the one hand, the keeper of a large saloon on Fourteenth Street was boycotted. Masses of workmen pa-

raded the street with bands and opprobrious epithets, which practically prevented the public from trading at his place. Judge Barrett decided that it was an illegal conspiracy by which both an unlawful injury to his property was effected, and the person taking part became liable to the criminal law; and they were convicted by a jury and sentenced. And Judge Barrett said that physical violence, or even the threat of physical violence, was not necessary; that people in modern life might be deterred from doing business by other means, such as by insult or opprobrious epithets, and the fact that the weak or gentle might be deterred from patronizing the shop was a sufficient menace to make it a criminal offence. Generally stated, however, there was nothing actually done in this case which the employees had not a perfect right to do. They had a perfect right to walk up and down the street in front of anybody's shop. Now, on the other hand, in a similar case which occurred in Boston only a few months ago, Judge Oliver Wendell Holmes held that such parading up and down in front of a shop for the purpose of inducing other laborers not to work for the objectionable employer was not a criminal conspiracy, and not even a conspiracy which gave the shopkeeper a right to a civil remedy or to an injunction. At first sight, it might seem impossible to reconcile these two cases, which I have taken as

samples; but I believe they very neatly show just where the true law, and I may add true morality, lies. In the New York case it became evident in the whole trial that the main object of the combination, though it may have started in a labor dispute, was not to improve the condition of the striking employees, get them better hours or anything of that sort; by the time the case got into the courts, at least, it was evident that the main object of their combination was to injure that particular employer; but in the Boston case the main object of the combination still was to get better wages, by refusing to work themselves and by persuading others not to go to work in their places; and the court must have thought that this persuading was the act, not the purpose, of the combination. You will note that the acts done in both cases were precisely the same. They can only be distinguished on this moral ground; but I believe that that may be a satisfactory and a sufficient reason for distinguishing them. In other words, the question in any case of boycott is, what do the persons combining really want? Do they want solely and simply by fair means to better their own condition? Or have they got into such a state of mind that they want maliciously to injure some particular employer, either their own or somebody else's?

Illegal Acts and Illegal Purpose.

I do not wish to confuse this statement, which I hope is a clear one, by any qualification; but lest I may not appear fully to cover the subject, I must note that there is one other point which may tend to such confusion if I do not speak of it, and which, perhaps, may have had something to do with this New York case; that is, the question of an illegal *act*. You will remember that what I call the second kind of conspiracy—by the way, I much prefer the phrase "illegal combination," for the very word "conspiracy" seems to imply something criminal—the second kind of illegal combination was that to accomplish a lawful purpose by acts avowedly illegal, or by means which would necessarily become illegal. That is, if in these cases the striking employees did have as a sole object the bettering of their own condition, and did not wish or intend to injure their employer, nevertheless, if circumstances were such that they could only persuade other employees from going to work for him by intimidation, the combination would have been unlawful.

And now we may, from these two cases, draw also another distinction which helps to make the subject clearer still, namely, that it is always illegal for persons to combine to prevent other persons from trading with A B, but it is not always illegal to combine for the purpose of persuading

other laborers from working for A B. Now, this distinction is entirely inexplicable except upon the ground I have mentioned, that in the one case it is more clear than in the other that the intent of the persons combining is to injure A B. Of course, if actual intimidation is used in either case, that is an illegal act, and the conspiracy may therefore become illegal under what I have called the second ground, although, on the other hand, it is possible that any specific act of intimidation might be punishable without holding that such act was so necessarily a consequence of the whole combination as to make the combination itself illegal.

In the same way, it makes a great difference whether the combination is made among employees or outsiders and directed against their employer or others. Employees may freely organize, adopt rules, impose penalties, or coerce themselves, but not third persons; still less can third persons combine to coerce a person not employing them. For in such case there can be no possible intentions of benefiting the conspirators, but at best a desire to help their fellow-workmen; and the law does not yet recognize altruism to this extent.

And just as men may not combine to do what they may lawfully do individually, they may not in many cases threaten to do what in doing were

lawful enough. A strike may be lawful, when the threat of striking is not. It has been decided that while considerable "picketing" is lawful, a threat to picket is not. So a man may do that himself which he may not persuade others to do. And as we have just seen, it may be lawful for individuals to persuade others not to work for A B, but not to combine with that purpose.

The Moral Test of Trade Combination.

So much for the law of boycotting as it stands to-day. In determining whether any combination is illegal conspiracy, you have to ask yourself, first, Does it try to accomplish an illegal thing? second, Does it try to accomplish an immoral thing? as if it seeks to injure some definite person, or class of persons, either by restricting him in the full use of his faculties, or by injuring or destroying any piece of property which he owns. And if it do none of these, you have still to ask yourself (although it is perhaps a combination for a perfectly legal thing), Was it contemplated, or does it necessarily imply, that the persons so combining in fact agreed to accomplish that end by unlawful means, as, for instance, by murder and destruction of property on the one hand, or by threats and intimidation on the other, or by fraud or any other thing which the laws forbid?

Sympathetic Boycotts.

Now, you will note that this reasoning entirely destroys what is called the sympathetic boycott as a remedy which labor may legally use. I make no comment on this. I merely state the fact. When the employees of a railroad combine to prevent the owner of Pullman cars from having free use of his property, it is perfectly clear that they combine to injure that owner; and as they have no contract relation with him at all, it is clear that their motive cannot be to get him to raise their own wages. Undoubtedly this is taking away a strong weapon from combined labor, but the question is whether it is taking away not a strong weapon, but a weapon which labor has any right to use. If I am annoyed by an ordinary trespass on my property, I may take the man by his neck and shoulders and put him out; but I certainly may not explode a dynamite bomb under his feet. When we say that the employees of the Pullman Car Company, for instance, had a perfect right not only to combine not to work themselves, but individually to persuade all the workmen in America not to work, we have given them all the weapons of warfare that the law at present permits to them. The sympathetic boycott, therefore, is illegal. Now, how about the sympathetic strike?

Strikes may be Illegal.

We have shown that the ordinary strike by itself has never been illegal in this country, and was probably only illegal a century ago in England on account of the peculiar interference of the government in labor questions. We shall find a singular repetition of this result of government interference when we come to consider our statutes against trusts; but for the present, and without such interference of peculiar statutes, a strike is perfectly legal; and this because the direct object of a strike is clearly to bring about the definite improvement of condition, or increase of wages, or decrease of working hours, for which the strike was instituted; and although the result may be to injure the employer, yet that is regarded, first, as too remote for the law to take cognizance of, and, secondly, as the mere necessary consequence of the ordinary efforts of persons to better their own condition, just as competition in trade, even when a combined competition, is perfectly legal, although any one person in the same line of business be injured or ruined thereby. But now suppose the strike is done in such a peculiar way as to unnecessarily injure the employer, so that the intention to injure becomes manifest. A preconcerted strike is avowedly a combination. If the motive of personal injury is clear, does it thereby become illegal?

You will find plenty of authority that it does. For instance, in Nebraska, which is not a State commonly supposed to be over-ready to favor capital, there is a case where eighteen tailors employed by one employer, having all of them taken out pieces of cloth to be made into garments, the cloth being already cut, agreed to strike on a certain March 31st, and return all their jobs unfinished, and in such condition that the cloth's value was destroyed, and the employer not being able to get other labor, suffered money damage. The Nebraska court here held that although any laborer had the right to leave his work when he choose, yet the preconcerted arrangement by all in this case bore such evidence of a specific attempt to injure the employer that an action for damages against the strikers would lie. So the United States courts have held that a strike so organized and managed as to appear to be expressly aimed at retarding the United States mail, that being an illegal purpose, became thereby an unlawful conspiracy. Nevertheless, my opinion is, and the brief time remaining compels me to state in this bald way what merely is a personal opinion, that it is hopeless for the law to go into such a question of incidental motive when the strike is otherwise legal, and is conducted in an orderly way. It would be hopeless for the courts to organize a definite body of law which should state just when

it was fair for all the employees of a railroad or a mill to leave work. They have the undoubted common-law right to leave at any time, individually or all together, and while it is possible that a mere malicious leaving of the work without any demand for higher wages or anything of that sort, could be called an unlawful combination, yet the moment any specific demand comes in, the courts must necessarily take that to be their main motive. At the most, the question whether they left work in such a way as to indicate a malignant purpose, could only be left to a jury to determine the fact; and there, as it seems to me, the question may safely rest. It is perfectly legal to provide against such an abandonment of important occupations as to work great damage to the community; and many States have so provided; that, for instance, in the case of engineers of railroad trains, they may not leave work until the day's run is completed, the cars left in the depot of their destination, and the engine safely housed. This in order to prevent the starving of passengers —women and children—as has sometimes happened by being left in the wilderness, possibly during a snow-storm. But in a general way, and in the absence of such reasonable statute, I believe that the courts will finally settle down into the view not only that a strike is legal, but that being legal it may be organized at any time the laborers

choose. And now as to the sympathetic strike. As in the case of the boycott, I am bound to say that as the law stands to-day the sympathetic strike is always illegal; that is, a strike avowedly not to obtain higher wages for themselves, but for some other body of employees, possibly not even in the same employment, is not such a motive of benefiting themselves as will justify the combination which has as a result and purpose the injury of their own employer, or the forcing him to boycott a third party. But even here, as I hold the future of labor law to lie largely in its recognition of what has been called collective bargaining, so I believe that a body of law will grow up which will recognize the strike in one part of a trade to benefit those employed in another part of a trade, or even a different trade entirely, as dictated by a motive which in the large sense is so clearly of benefit even to the striking laborers themselves in the long run, as to make the combination a justifiable one; particularly when conducted by a responsible trades-union, including all parties on the labor side. The law, however, in this country at least, has not yet come to this large view. In England, which has been always some years in advance of us upon labor questions, there are statutes expressly recognizing it.

Illegal if by Persons Under Contract.

Of course, if a strike amount to the breaking of a definite contract, that being illegal in itself and made expressly so by the statutes of many of our States, and by the English statute, it will render the whole thing illegal; and this is undoubtedly the most logical reason that laborers have for objecting to any definite contract-system which makes employment, instead of being from day to day, from week to week, from month to month, or even from quarter to quarter. For instance, there were threats some weeks ago of a strike on the West End Railway at Boston, at the time of the Christian Endeavor Convention, to be organized then for the very purpose of increasing the damage to the railway. Would such a strike have been legal? I think perfectly so; but, undoubtedly, if all the employees had been employed by contract requiring both sides to give thirty days' notice, the combination *to break* this contract would have been illegal. Nevertheless, I believe that labor should take a higher view and recognize that the advantages of a definite and fair contract far outweigh the value of this particular weapon, which, after all, is a somewhat vindictive one. I doubt very much if, in the long run, a strike with such a purpose of excessive or specific injury to the employer does any good to the employee. It leads to vindictive feeling on both sides, and probably the

employer will get even with the striking employees sooner or later.

Persuading of Strikes.

The leading case on strikes to-day is the Northern Pacific Railroad case, which is most instructive in showing the distinction I have just taken, for the reason that in the first case the lower court granted an injunction against the striking railway operatives, both from persuading others to strike, and from striking themselves in such a manner as to cripple the employer's business. But upon appeal, Judge Harlan of the Supreme Court of the United States rendered another opinion which annulled this part of the injunction (Arthur *vs.* Oakes, 63 F. R., 310).

Union Labor.

This brings us to the great question of trades-unions, and to the question of employing or not employing union labor. The subject of trades-unions themselves, I have reserved for the last lecture, as I believe them to be one of the remedies of the future; but the question of employers discharging men because they are members of a union, or of unions forcing employers to discharge men who are not members of a union, rather comes under the head of the boycott, which we are now considering.

Trades-unions were, undoubtedly, at one time

held to be illegal in England; probably never so in this country; and now there are express statutes in nearly all the States authorizing and encouraging their formation. In fact, the only difficulty with us, as in England, is to persuade the trades-unions to come under the law and make themselves legal corporations. The members prefer power without responsibility, and fear the liability to injunctions which an organization would give them. There have been many acts in England legalizing trades-unions, passed in the nineteenth century. I have only time to mention the act of 1871, now in force, because its provisions go into such details as to be very instructive to any student of the labor question. The Trades-Union Act was passed in connection with the Criminal Law Amendment Act relating to intimidation, etc. That is, on the same day, Parliament passed one act to show how far workmen, individually, might go in industrial warfare, and another stating clearly how far they could combine for the purpose.

This act provided that any person who should (1) use violence to persons or property, (2) threaten or intimidate any person in such manner as would justify a binding of him, to keep the peace, by a magistrate, (3) molest or obstruct any person in any of the following ways; that is:

(1) By persistently following him; (2) by hiding tools, clothes, or other property owned or used by him, or depriving him of, or hindering him in, the use thereof; (3) by watching or besetting the house or place where he lives or works, or the approach thereto, or following him in bands, of at least three persons, in a disorderly manner through any road, with a view to coerce such person being a master, (1) to dismiss, or cease to employ, any workman; (2) not to offer any employment or work; (3) to belong, or not to belong, to any association or combination, temporary or permanent; (4) to pay any fine imposed by such association, etc.; (5) to alter the mode of carrying on his business, or the number or description of any persons employed by him. Or, being a workman, to quit any employment, or return work unfinished; or, being a master or workman, (1) to belong to, or not to belong to, any temporary or permanent association or combination; (2) to pay any fine or penalty imposed thereby.

The actions above defined are made criminal offences, provided that no person shall be liable to any punishment for doing, or conspiring to do, any act on the ground that such act restrains, or tends to restrain, the free course of trade, unless such act is one above specified, and done with the object of coercing as above mentioned. Offences under

this act are to be punished under the summary jurisdiction acts (11 and 12 Victoria, Chap. 43).

And, on the same day was passed Chapter 31, the Trades-Union Act, which provided that the purposes of any trades-union shall not, by reason merely that they are in restraint of trade, be deemed unlawful so as to render any member liable to criminal prosecution for conspiracy or otherwise, or so as to render void any agreement or trust, but also providing that nothing in this act should enable any court to entertain jurisdiction of legal proceedings instituted to enforce or recover damages for the breach of :

(1) Agreements between members of a trades-union as such, concerning the conditions on which they should, or should not, sell goods, transact business, employ, or be employed; or, (2) for the payment of any subscription or penalty to a trades-union; or, (3) for the application of the funds of a trades-union to provide benefits to members, or to furnish contributions to outside laborers or employers, or to discharge any fine imposed by court; or, (4) any agreement made between one trades-union and another; or, (5) any bond to secure the performance of any of these four classes of agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

The practical result of this will appear to be to

allow trades-unions, and the members thereof, to make such agreements, but to leave them to their own remedies in case they are broken; which, indeed, are doubtless quite adequate.

The rest of the act provides generally for the incorporation of trades-unions, their government, and their powers in holding property; for their registration, rules, and annual reports.

The English Statute.

Now, the first thing that happened under this new act was the case of Queen *vs.* Bunn (12 Cox C. C., 316), which is the leading English authority on the whole subject, as well as the latest. This was a case where servants of a gas company, working under contract of service, agreed together to quit the service of their employers, without notice and in breach of their contracts; and, as the Masters and Servants Act of 1867 made the breaking of a definite contract by either side a minor penal offence, the court, in spite of the new statute, declared that, being a combination to bring about a breach of contract, the act did not apply. Thereupon the Act of 1875 (38 and 39 Vict., Ch. 86), concerning conspiracy, was passed, which was the last word upon the subject in England, and was clearly meant to meet this case. It declares that an agreement or combination of two or more persons to do, or procure to be done, any act in

contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime. In other words, the English Parliament have gone to the length of wiping out the whole doctrine of conspiracy, and the act is so radical that I do not see how (except in the cases specially excepted by the act itself, such as riot or unlawful assembly, or strikes by persons in breach of a contract of service where such breach involves probable injury to life or property) there can be any further question before the English courts of a criminal trial of any person in a dispute between labor and capital, when the person would not have been triable had there been no such thing as labor and capital in the world. Whether such a statute would be even constitutional in this country may be questionable. It is the clearest kind of class legislation.

The Parnell Case.

For instance, the English courts still hold, as they did in Mr. Parnell's case, that a combination to incite tenants not to pay rent is a conspiracy, and the indictment against Mr. Parnell defined the word "boycott" in this case, by which means the combination not to pay rent was brought about, in the following words: "Threatening to cut off from all social intercourse and communion, inter-

course and dealings in the way of business, and to shun as if affected with a malignant disease, and hold up to public hatred and contempt, and subject to annoyance and injury and loss, in the pursuit of his lawful occupation and industry, any tenant who paid his rent," etc. Whether, by statute, you can exempt capitalists and laborers in an industrial dispute from liability for a thing which is criminal in a dispute between landlords and tenants, without, in this country, enacting unconstitutional class legislation, may fairly be questioned. Under the decisions of the Western and Southern States you clearly cannot; and I may say that it is probable that only in Massachusetts and a few other States would such a statute as the English statute now be constitutional.

American Statutes.

We have, indeed, many statutes on the subject, but they do not go so far as this. Thus, in Pennsylvania, any laborers acting either as individuals, or as members of a union, may refuse to work for any person whenever in their opinion the wages paid *them* are insufficient, or the treatment offensive, or when continued labor by them would be contrary to the rules of any union, and will not be subject to prosecution for criminal conspiracy in so doing. In New Jersey, persons lawfully and peaceably persuading, advising, or encouraging

other persons to enter into any combination for or against leaving, or entering into, the employment of other persons, are declared not guilty of criminal conspiracy. And the same law substantially exists in Colorado. So, in New York and Minnesota, the orderly and peaceably assembling, or co-operation, of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages, is not a conspiracy; and Minnesota has gone nearly the full length of the English statute, except that they have avoided the objection of class legislation, by providing that no agreement of anybody, except to commit a felony, arson, or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect this object by one of the parties. This, you will note, is not quite the length of the English statute, because it does not wipe out the law of conspiracy, provided only some overt act be committed; and this is the law of the United States act against trusts, which I am coming to presently. But the new codes of North Dakota and Oklahoma do expressly repeal the common law of conspiracy. Maryland, finally—and I should have noted this before—has adopted the full English statute by an act of 1888, and like it provides that nothing in the statute shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offence against any person or against property;

but the exception is probably unimportant, as such would be the implication anyhow. So far as I know the constitutionality of this statute has not yet been decided in Maryland.

But now, on the other hand, we find the following statutes in this country, which go the other way. Thus, by express act of Oregon and Florida, it is a criminal offence to conspire for the purpose of preventing any person from procuring work, or for the purpose of procuring the discharge of any workman, and, in like manner—these statutes, by the way, are universally fair to both sides—it is forbidden for the employer to attempt to prevent any person from obtaining employment whom he has discharged. In this connection I would add that many States already have adopted, and all the States are rapidly adopting, statutes against black-listing; that is, against the attempt of an employer who has discharged a workman for a trade dispute, to prevent his getting work with any other employer. In Michigan, any two or more persons who shall combine for the purpose of wilfully or maliciously injuring another in his reputation, trade, or profession, by any means, or for the purpose of maliciously compelling another to do, or perform, any act against his will, or prevent him from doing any lawful act, are guilty of criminal conspiracy. This is an interesting statute, for, as you will see, it expressly re-enacts the

whole common law of conspiracy and constitutional right to freedom of contract. So, in Illinois, if any two or more persons combine for the purpose of depriving the possessor of property of its lawful use, or of preventing, by threats or any unlawful means, any person from being employed by, or obtaining employment from, such possessor of property upon such terms as the party concerned may agree upon, the persons offending may be fined or sent to prison for six months; and, also, if they conspire, or the officers of any society or corporation shall issue any circular as to the government of or instruction to its members, or any other persons or companies for the purpose of establishing a boycott or a black-list, or shall post or distribute any written notices with intent to injure the person, character, business, employment, or property of another, or to do any illegal act in restraint of trade, or injurious to health, morals, or justice, the persons may be imprisoned for five years and fined two thousand dollars. This statute, also, is aimed at the employer and laborer alike. So, in Texas, an unlawful assembly is defined to be the meeting of three or more persons with intent to aid each other by violence, or in any other manner, either to commit an offence or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof, or to prevent his pursuing any labor, occupation, or employ-

ment, or intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another. This statute is broad enough certainly, and it is interesting as coming from the State of Texas. There are similar statutes in Georgia and Tennessee, the latter being expressly aimed at the threatening to discharge any employee for trading, or not trading, with any particular merchant or person; and that of Georgia specially prohibiting the hindering any person from taking an apprentice to learn a trade; and, finally, the Legislature of Louisiana, by resolution, July 12, 1894, made a kind of *pronunciamento* condemning the efforts of foreign emissaries to disturb the public peace by fomenting discord between employers and employees at a time "when there is no cause for discontent and no grievances to be redressed," and commended the railroad operatives of the State for repulsing the overtures of such agitators and refusing to join in the Chicago strike.

So much for the general view our legislatures are taking of boycotts; and, further, as to the specific acts declared illegal, we must note that Rhode Island and Maine forbid the wilfully obstructing the use of the property of another, or obstructing another in the prosecution of his lawful business or pursuits. Connecticut forbids the persistently following a person in a disorderly manner, or the

threatening to injure his property, with intent to intimidate; while New Hampshire makes it illegal to insult or call offensive names to persons passing to, from, or about their lawful employment or business.

Lock-outs.

The lock-out is the obverse of the strike, and both are legal; the black-list is the obverse of the boycott, and both are illegal. Trades-unions and combinations of employers or employees are also legal, and become illegal only when falling under the prohibition of such statutes as I have read, or when aimed at the injury of the public, or a specific person, or class of persons, other than the party to the dispute, or at the party to the dispute himself when the immediate intent is to injure, even though the ultimate motive be to benefit the members of the combination. Such is the American law of the strike and boycott as it exists to-day. It is a law essentially moral. If those of you who are laborers feel any doubt as to whether ever any proposed action of your men falls under the above definition so as to be illegal, the best answer I can give is, Ask your consciences. So stands the law.

Discharge of Union Men.

We have two most interesting points left to discuss—the one, that of the employment of union

men already mentioned, the other that of the employment of Pinkerton men, or other mercenaries, to protect the employer or his property. As to the first, I think I have already said that there are in many States statutes forbidding the employer to refuse to employ union men. Are such statutes constitutional? I can only tell you that a minor court in Ohio has held they are, while the Supreme Court of the State of Missouri, in a decision filed only on the 18th of last June, has squarely declared they are not. The Ohio case is probably of little authority. An inferior court rarely declares a law unconstitutional, and the judge gives no reasons; but the Missouri case is well considered and of great authority. And, in connection with this, the Circuit Court of the United States in the Reading Railroad case, where the question came up whether the receiver of a Federal court had the right to enforce a rule requiring that only non-union men should be employed, although the then Attorney-General of the United States, Mr. Olney, wrote a letter, stating the view of the legal department of the government, in whose charge the Reading Railroad then was, the Court refused to annul the regulation discriminating against union men. There the matter rests. The statute exists in Massachusetts, but has, I believe, not yet been passed on there by the Supreme Court. It certainly would seem that the Missouri court was right, and that if em-

ployers of labor are to come to employ only members of trades-unions, it would be better and more in consonance with the principles of a free government to them, to be persuaded, not coerced, by the trades-unions themselves, rather than have the government undertake it by law. The fact that coercion is illegal is just why the union want a statute. But if laborers are willing individually to leave work when non-union men are employed, they will soon get their wish. Where, however, a laborer is under contract, it is of course constitutional for a statute to forbid the employer from discharging him because he joins a labor-union, and the courts would, doubtless, hold that this was not sufficient ground of discharge in the absence of any statute. This, therefore, is a case where we begin to see the advantages of a definite contract to the laborer himself.

The Future of the Boycott.

Closing this subject, I have reserved one most interesting case for the last, and a case which, though decided in that instance in favor of the employer, holds open, as I believe, a new prospect of legal remedy to the laborer. The case is that of Cote *vs.* Murphy, decided in Pennsylvania in 1893. This was a case where the workmen engaged in building-trades had entered into a lawful combination to advance wages by reducing the

hours of labor. Lawful, that is, not only as I believe, by the common law, but by that statute of Pennsylvania to which I have referred. The defendants were members of an association of employers which, by a combination not so made lawful by the statute, because it was a combination of employers, agreed among themselves not to sell material to contractors who conceded the advance of wages, and induced other dealers not to furnish such contractors with materials. A certain builder —that is, a capitalist who sold materials to the employers of labor—who had met the demands of the strikers, brought suit against the combining employers for refusing to sell him material, so that he was not able to procure all the building material he desired. Here was a case where there was a combination of laborers, legal by statute, a combination of employers, not legal by statute, and a capitalist suing the employers' combination because they boycotted him for being in league with the striking laborers. The court held, in a most elaborate opinion, first, that they would not decide whether the Pennsylvania statute exempting employees from the penalties of unlawful combination was unconstitutional as being class legislation, or whether the scope of the statute should be so enlarged by its express words as to include within its protection all those interested in the same subject of legislation, that is, employers as well as

laborers. They so found it unnecessary to pass on the constitutionality of the statute, because they said the strikers having combined against the employers, the employers had a legal right to combine to resist them ; that the elements of an unlawful combination, the intent to restrain trade for greed of profit to themselves, or the intent to do harm toward the strikers specifically, were absent, but the combination of employers was merely done to resist a combination of employees, and therefore the plaintiff could not recover for being boycotted.

Now, suppose we turn this reasoning the other way. Suppose all employers combine to regulate the prices of wages. Suppose, then, all their employees combine against such employers ; then, under the decision of this Pennsylvania case, you will have a justification of their action, which may even go to the length of sustaining the sympathetic boycott. At all events it will establish as a legal principle that principle of collective bargaining between associations legally organized and personally responsible on both sides, which, as I believe, holds the future of the peace of labor.

Pinkerton Men.

I find I have forgotten the Pinkerton men. Well, a few States have begun to pass laws making their employment a penal offence ; but a man has

a constitutional right to protect his own property. Has he not a constitutional right to pay others to do so? Remember, he runs great risks in doing so, for the moment any one of his Pinkerton men transgresses his rights of mere self-defence, every employer may become liable for damages, or even criminally.

The two statutes so far passed against them are in Missouri and Wyoming. The Missouri statute declares it unlawful for any person, etc., to bring, or import, into the State any person or body of persons for the purpose of discharging the duties usually devolving upon police officers or deputy-sheriffs in the protection of property, and no sheriff shall appoint a deputy who is not a *bona-fide* resident of this State.

Now, there is no constitutional objection to this statute, except that which arises from the general rights of United States citizens. The prohibition, that is, is not against employing Pinkerton men, but against employing Pinkerton men who are not citizens of Missouri.

The constitution of Wyoming provides that no armed force or detective agency, or body of men, shall ever be brought into the State for the suppression of domestic violence, except upon the application of the Legislature, or the executive when the Legislature cannot be convened. It does not say who is not to bring them in, and by its terms

would seem to apply even to the national government. If so, it is in conflict with the Federal Constitution; it would have precluded President Cleveland's action in the Chicago riots. The employment of Pinkerton men is, doubtless, a great evil, and has seemed to many students of the American system to be the most sinister development that has happened in recent years of the republic. But the remedy would seem rather to make their employment unnecessary, by the States themselves protecting all classes of persons in the enjoyment of their constitutional rights, a republican government, and the law of the land.

IV

FORECAST OF THE FUTURE

We may now come to consider the future of the labor relation, the remedies and resources of both sides, but particularly of labor, in what has been called the warfare between labor and capital, or in bettering its condition without warfare. The latter is the more congenial view of the subject, for, as one of the objects of all civilized government is to prevent warfare and violence, so we may hope that the object of a higher civilization will be to prevent even that kind of warfare which consists in opposition and animosity as well as physical violence.

Labor Injunctions.

The side adverse to labor we may consider very briefly. The most notable development of recent years is the tendency, both on the part of the public and employers, to resort to the peculiar process of courts of equity to enforce what they deem proper conduct on the part of the employees. I wish I had time to go into this matter here at

length.[1] The subject may be summarized in the following statements: Our courts of equity to-day represent the old power of the king in compelling the peace of the realm, and in ordering his subjects to do what the chancellor deemed the right thing among themselves. Law, as distinguished from equity, will never interfere among individuals or even on behalf of the State, to enforce a contract, to make a man, or set of men, do anything, and the peculiar power of proceeding in equity rests largely on the fact that the chancellor could order people not only to keep the peace and abstain from violence, but to perform any contract or any obligation which the laws of the realm imposed either as toward other subjects or toward the sovereign. This power of enforcing action, what we call specific performance in the law, is a very great one. It is made effectual by what is called process of contempt; that is, any person failing to perform the order of the court of chancery could be summarily imprisoned by order of the judge without jury trial, and without indictment in ordinary form, until such time as he actually did what the court required him to do.

Recent Extension of Court Interference.

Now, this special subject of the courts of equity has received a great extension in this country in

[1] See Political Science Quarterly, June, 1895: "The Modern Use of Injunctions," by F. J. Stimson.

the last few years, and that in a very peculiar way; and it is another example of the danger of passing extraordinary laws which interfere in an unusual way with the bills of rights; for, in old times, the English chancellor, who was the king's right-hand executive officer (and courts of equity and courts of chancery are, as you understand, the same thing), in the time of great disorder which ensued upon the early civil wars in England, would interfere to protect private citizens against oppression, to protect the weaker side against violence, and to compel all subjects to preserve the peace of the kingdom. He would, for instance, order people, against whom the writ was claimed, not to commit riots or destruction of property, nor to commit personal injuries, or even crimes, and this summary jurisdiction, say the old writers, was in those days necessary to the peace of the realm. But in so far as the jurisdiction went to prohibit criminal offences and punish offenders summarily by the order of the chancellor, it was always extraordinary; shared also by the notorious court of Star Chamber, it led to great abuses, as by it obnoxious persons, or persons out of favor with the ruling party, could be arrested, tried, and punished, without any of the ordinary safe-guards of warrant, arrest, indictment, jury trial, obtaining evidence, and fixed rules of punishment which the English Constitution required. There-

fore, this criminal jurisdiction of the court of chancery fell into disfavor, and, finally, into disuse. It was entirely gone by the time of the Revolution, if not by the time of Queen Elizabeth, and has never, in England, been revived since. The only part of the old equity jurisdiction which was left was that concerning, specifically, property rights; that is, where an injury to *property* was apprehended, for which a suit at law for damages would be no remedy, or where a man refused to perform a property contract for breach of which the other party had no equity remedy by damages; in these cases only could this extraordinary power of chancery still be invoked. Constantly from that time until now, the English court of chancery has refused to issue an injunction solely against committing a crime; and during the same period grew up the doctrine that it would not enforce contracts for personal labor. This is the important matter I referred to in the last lecture—that you may obtain the actual performance of a contract by bringing into chancery the party refusing to perform it in all cases of property right, in all cases except where the contract is merely for personal service. These two principles, that chancery will not enjoin against criminal offences, and will not enforce contracts for labor and personal services, are of the very greatest importance.

We started our courts of chancery in this coun-

try, giving them the same jurisdiction they had in England. In fact the Federal law expressly states that they shall have such jurisdiction as the English courts of chancery had in Lord Eldon's time, about the beginning of this century. Therefore, as I hold, our courts of equity too may not interfere actively to prevent or punish a criminal offence as such, and may not enforce a contract of labor or personal service. But the property right remained; that is, you could go into chancery to prevent a man, or set of men, from committing a definite injury to property, and particularly when the injury was of such sort, or consisted in such an indefinite series of injurious acts by an indefinite number of people, that the common-law remedy for damages was not adequate. Now, this is a valuable jurisdiction, and, so far, it is well enough. But in 1887 was passed the United States law regulating interstate commerce, and in 1890 the United States law against trusts. These extraordinary statutes were meant to be in the interest of the people. They attempted both to prevent combinations in restraint of trade, to raise prices, etc., and combinations to interfere with interstate commerce. But the extraordinary feature of them was certain sections which gave, as it were, a certain property right to the United States in subjects of interstate commerce, and expressly authorized the United States to go into a

court of chancery and proceed, by injunction, against men who interfered with trade between the States. Now, that part of the act which was aimed to protect the public mainly, failed. As you know, the reorganized sugar trust escaped the anti-trust law entirely for the reason that being now a corporation established in one or more States merely for the purpose of refining sugar, the Supreme Court of the United States held that they could not assume that the sugar they made was to be the subject of interstate commerce, and therefore the sugar trust did not come under the statutes. But, on the other hand, in the great business of railways, and also of stevedores, sailors, wharf-laborers, and certain other classes of laborers who were employed in handling goods designed for shipment to another State, these statutes gave express power, and, in fact, directed the United States, through its Attorney-General and District Attorneys, to interfere actively by the strong arm of a court of chancery, and restrain any men, or body of men, who interfered with this, as it were, property right. Before that the government could, at most, only have been held to have such property right in the United States mails; but the practical effect—and I am not now speaking technically—of these statutes was to extend such property right to any articles which were, or were intended, to become the subjects of

interstate commerce. This actually put the whole transportation interest of the country under direct charge of the government, with the mandate to the government to interfere and see that no combination was made against such transportation.

As a result of this, such combinations, strikes, or boycotts became an unlawful conspiracy; for that was now unlawful which, before the statute, had not been; and under the definition of "conspiracy" I gave you in my last lecture, you will easily see that all such combinations fell at once under what we called the first branch of conspiracy; hence, the omnibus injunctions levelled against not only the actual offender, Debs, or others, but against any men or class of men, though unnamed in the bill and unknown, who might after interfere with such transportation; and hence, under the contempt process, they were arrested by United States Marshals, brought into court, and imprisoned without jury trial, and in some cases long after the danger or emergency which justified the injunction had passed.

Now, under the two laws I have mentioned, there is no way of avoiding this except by passing new laws. As the Supreme Court has just held, the sole question is one of jurisdiction; and if the persons proceeded against were properly before a court of equity, and the court had jurisdiction of

the subject-matter, the power to punish them by contempt follows as a matter of course.

Objections to Equity Government.

There seem to me to be two objections to this ; I mean objections on broad ground of expediency and right, and the future safety of the government, not, of course, technical objections of law. One is, that as we now stand, any laborer, or class of laborers, though he has received no notice of a suit in court, may find, any day, that an ordinary trespass or neglect of duty made by him will subject him to a criminal punishment without indictment, jury trial, or certain laws defining the extent of the punishment ; he may possibly find himself in jail without a trial, though he himself has committed no overt act, but merely by being a member of a trades-union or combination, some of whom have committed an overt act of trespass, or, perhaps, even solely because the purpose of such combination or union has been by a strike or boycott directly, or indirectly, to interfere with transportation. This is one objection. The other rests on broader ground still. As you know, our Constitution provides that the executive and jndicial branches of government shall be forever distinct. This is not only because the judicial branch is in no sense competent to perform executive functions, but, because from the very nature of

their judicial duties, they ought not to become active participants in the important events which they have to judge; and there is one other thing still which increases this new executive power very much more—that is the peculiar process of putting corporations, railroads and so on, in the hands of receivers when they cannot pay their debts. As you know, in modern times whenever a corporation finds it cannot pay its debts, it rushes into a court of equity and gets some person—usually one of its own officers—appointed receiver, and thereupon all suits and claims against the company are suspended. Corporations do this for very much the same reasons, and with very much the same results, as when an individual sought the sanctuary of a church in mediæval times. In the sanctuary of the receivership the corporation cannot be touched. But the labor result of it is purely fortuitous, one of those accidental consequences which shows again that you never know where the result of an extraordinary law or remedy is going to end. The technical doctrine of a court of equity is that the receiver is the officer of the court. As such, an interference with a railroad in his hands is an interference with the order of the court of equity, which, at once justifies all this injunction and contempt process of which I have spoken. During the last few years a vast proportion of our railroads —possibly one-third in mileage—went into the

hands of receivers, that is, into the hands of the courts. They were run by the judicial branch of government. Any interference with their running became a contempt of court, and, consequently, a strike upon a railroad in the hands of a receiver might subject the strikers to this extraordinary punishment, when a strike against an ordinary railroad would not have done so. This receivership process, with the Interstate Commerce and the Anti-Trust Laws, are the principal causes of this immense extension of the function of the Federal courts in the last few years, so that they have practically found themselves part of the executive of the government; and here, I think, is the greatest danger of all. Physically and morally our courts ought not to be required to stand such a strain. In fact their power in so doing is far greater than that of the executive itself, for the reason that the executive is subject to the *habeas corpus* act, and the ordinary restrictions of criminal process, but the equity courts, although the punishment, of course, is never extreme, are not. They, or their appellate courts, must themselves judge the propriety of their own acts. We all want order maintained throughout the country, and most of us, doubtless, commended Mr. Cleveland for his prompt and forcible action in the Chicago strike; but if such action had been expressly based upon the ground that the trans-

portation of the mails was being interfered with, that riots and crimes were being committed which made, practically, a state of insurrection, so that the republican form of government in certain localities was being threatened, rather than upon the ground so much less impressive to the public mind that certain equity processes of Federal courts were not being executed; and then if all the offenders, whether arrested by troops or by deputy-marshals, had been brought before the Federal grand jury, indicted and tried by a jury in the ordinary way, I cannot but think that the lesson to the people would have been better given, and certain great dangers in the future avoided; for the government, and especially the judicial branch of the government, must not even appear to take sides in this labor question.

So much for these extreme remedies. As to private employers, they may safely be left to protect themselves by the remedies now open to them. It does not seem to me that their side is in any great danger at present, except perhaps from hasty and unusual legislation, which I have so often spoken of in these lectures. Under that growth of the modern doctrine, which I have tried to describe, they are free to combine when combination is reasonable and possible, and will doubtless do so should it become necessary.

Co-operation.

Turning now to the labor side. The first of the remedies commonly suggested to us is that of co-operation or profit-sharing. I wish it could be said that the progress of this in the past had been such as to justify a feeling that this might be the solution ; but in the first place, you must note that under the system of the much-abused corporation itself, it has always been possible for the laborer to become a partner with capital in his own employment if he chooses. It is rather singular that attention has been so rarely drawn to the fact that in any mill or industry to-day, for they are nearly all corporations, it is perfectly possible for an employee to buy stock, and therefore get his share in the extraordinary profits, if any there be. As we know, the laborers never take advantage of it. Why do they not? Probably the answer must be simply that as capitalists they are discontented with the ordinary returns which capital brings its possessor. It was distressing, the eagerness with which the laboring classes rushed into the benefit societies of a few years ago, and distressing the amount of hard-earned savings they must have lost in these concerns simply because they promised ten or twenty per cent., or something far above the proper return upon capital. But the fact is that the laborer is not induced to save money for the purpose of getting the modest return which mod-

ern conditions allow to capital. This is natural enough when we consider the amount of savings that would be needed to give a skilled laborer, in dividends, the same amount per year for the last years of his life that he earned when in his prime. The normal return upon money put out at interest is probably not over four per cent. when we allow for losses; but taking it higher than this, regarding it as a dividend, it is certainly not over five per cent. Counting bad investments with good, that man is very fortunate who gets an average of five per cent. dividends upon all his stocks. Now, if I assume a skilled industrial laborer to make $600 a year during the best years of his life in wages, it requires an investment of $12,000 to realize that sum, which is precisely the full wages for twenty years. How can the laborer hope to save any such capital as that? We cannot blame him for not being attracted to scrimp and save for many years for the sake of getting some trifling fifty or one hundred dollars yearly return as a capitalist—too little for a living, and acquired at too much sacrifice to be an inducement as pocket-money.

Profit-Sharing.

There is more hope in actual profit-sharing plans, more hope, perhaps, in co-operation. The reason of this is that here the laborer becomes,

not the ordinary small investor of capital, but an actual partner in the possible extraordinary profits of his business. Forty years ago there was, doubtless, great hope in this direction, and many of our States have elaborate statutes authorizing co-operative and profit-sharing corporations; but they have not been taken advantage of so frequently as we could wish, and, moreover, the event shows that the common course of a successful co-operative corporation is to develop into an ordinary stock company, owned mainly by two or three individuals whose greater ability or greater acquisitive powers have enabled them to make a success of the business. I by no means wish to dismiss co-operation as an idle dream, I only say that I fear we cannot yet call it a panacea for labor troubles.

True Demand of Unions.

The fact is that what the laborer really wants, and what the trades-unions in England have at last got to the point of admitting that he wants, is not profits as a capitalist, but a greater share of the profits of industry as part of his own wages. This is the plain English of it, and this we should fairly recognize. In other words, they desire a partnership with capital, not in the sense of being capitalists to an infinitesimal extent themselves, but that it should be recognized either by fact or by law that labor and capital working together

are, in effect, partners. Both are to be paid as partners out of the output of their industry, out of the realized profits, not out of any mythical wages fund which represents only that sum which will support all the persons in any one year seeking labor in the country at the lowest living rates. Rightly or wrongly, this is the demand of labor, and it is for the future to determine how far it can be safely and fairly recognized. Perhaps, at present, the trades-unions have only got to a point of simply exacting increased wages, without regard to the industry. Mr. Spyers, who wrote the last English book on the labor question, a summary of the results of the Royal Commission of Labor of 1893, tells us, "It is clear that the natural attitude of trades-unions toward profit-sharing is one of hostility. Being, essentially, organizations for appreciating wages at the expense of profits, they could hardly be expected to welcome with cordiality a scheme which gives the workman an interest in the integrity of the profit-fund." But, whichever labor desires, be it called increased wages or a share in the profits, how is it to be brought about?

"Collective Bargaining."

To this we answer, by combination of labor which will enable them to use what I have called collective bargaining. There is no doubt of this,

and I for one should be glad to see the bulk of the industrial laborers of the country organized in definite unions, and conduct their interests in this way. Most progressive employers are now beginning to find the advantage of having a definite and responsible body to deal with, so that, when they make an agreement with them, it amounts to something, rather than with irresponsible workmen. Most employers are more and more willing to practically arbitrate wherever they can find such a responsible body. The difficulty to-day is quite as much in getting the laborers to organize into such definite unions, with the further difficulty that the laborers, when they have so organized, find it difficult to enforce their own rules, and, consequently, any contract or compromise they may make even as against their own members. The evidence of the English Commission was full of instances where men who have endured the miseries of a strike for months at a time without a murmur, and in perfect obedience to their officials, yet, on the most trifling grounds, refused to endorse the terms which those officials had arranged with the employers. It is to combat this difficulty that many unions make strict rules against members leaving their employment without the sanction of their union, the offence being punishable by expulsion. How can the employers bargain or arbitrate with employees, even with

the unions, when the members of the unions are not true to the union itself? In the English strike of the blast furnace men, after the union had agreed upon a satisfactory sliding scale of wages, the engine-men and crane-men left the association and set up an independent organization of their own. As was pointed out by Mr. Bell before the English Commission of Labor, it would be impossible to bargain with the unions if this sort of thing happened often, for one cannot negotiate with a body that one cannot grasp.

The usual method the union employs for controlling these members is the beneficiary fund, in which they all have an interest, and which they are liable to lose if expelled from the union. The English statute, you will remember, while recognizing the legality of trades-unions, makes a special exception that the contracts made between them and their members cannot be enforced by either side in the courts. This was done at the request of the unions, who feared endless litigation with their own members, for their beneficiary funds are not only an insurance to the members (meeting that very question of their old age which we discussed a moment ago) and a guarantee both to the laborer and the employer, that any collective bargaining made by the unions will be carried out in times of industrial peace, but a fund for strikes in times of labor war. Now, labor

leaders tell me that they regard this last function as the highest purpose of the fund. In other words, they desire to be at liberty to exhaust the whole accumulated fund in a strike, if necessary, in spite of all the individual contracts they may have with the members who have contributed to it for death benefits, insurance in times of illness, support while out of work, etc. Of course, if the union with its fund were legalized under any corporation law, such an entire application of the fund to strikes might be a breach of contract, and would certainly be a breach of trust from which the officers of the trades-union could be restrained at suit of any individual member. The principle of all labor combinations up to date has been to secure the greatest possible amount of power by lawful methods, or even by unlawful combinations, while not assuming any responsibility whatever, either to employers or to their own members. Now, I am well aware that it is, at first sight, an attractive position to labor to be in the position of a guerrilla army, which, while making a simultaneous attack, can dissolve at the moment of any defeat, and scatter, so that while it may sometimes win, it can never lose. Nevertheless, I believe these advantages are superficial, and the true interest of labor lies the other way. This is, after all, like the position of slaves or savages. No contracts can be enforced against them ; they can

scatter in the woods and do individual damage when as an army they have yielded. Nevertheless, in the long run, while their outbreaks are suppressed, they cannot, by peaceful means, gain much for themselves as a class. I have yet to learn that it is a blessing to a free citizen, or a free body of citizens, to be unable to make an agreement with the persons with whom they deal. Provided only the civilization of a country be diversified enough to give a chance for every man, the true power of labor comes from its being in a position to dictate agreements for wages and times of labor, which the other side has the power to make; and it has not such power with persons practically incapable of contract. And this, I think, is true in modern times, even if we admit that there is a mass of unemployed ready to come in at any price, for that very power of responsible combination enables the workman in skilled trades—and nowadays all trades are skilled—to put up a barrier against such outside parties by being, as a body, on terms of contract with their own employers, far more effective than under a system of every man for himself.

Remedies open to Labor.

If you agree with me that we are to have combinations of labor which shall bargain collectively with capital, what weapon shall they have for en-

forcing their demands? I answer, if every combination be really successful, that is, if it include the bulk of workmen in a given trade, by strikes—not by boycotts, except of the merely persuasive kind, and addressed primarily to members of their party, that is, to other laborers. The fact that the striking workmen are to be supported during the strike out of union funds will ultimately prove a sufficient guaranty at least of *prima facie* justifiable cause; and we must not forget that there is one other motive of a union strike which is perfectly legitimate; that is, as was well pointed out in the evidence before the Labor Commission, in order to show that a union is strong enough to strike effectively, both for the purpose of convincing the employer that the strike is dangerous to him and that the labor body striking is one of sufficient importance to deal with; and for the purpose of convincing the employee that the union has grown sufficiently to make it pay for them to sacrifice part of their earnings for its support. There should, of course, be a reasonable ground for a strike, but if the union approach the employers with a definite and reasonable request, and a steady determination not to take "no" for an answer, it will at once gain the confidence of the workmen; and if it convinces the employers that it has gained the confidence of the workmen, the battle is already half won. The evidence before

the English Commission showed that employers seldom fight, or care to fight, against an organization which they feel really has the unqualified support of its members. Industrial warfare, therefore, is sometimes necessary to prove the right of a union to its existence. Hence, strikes, and hence, too, the reason that the weaker and younger the union, the more strikes it is bound to declare. But the reason of it is, and the facts in England at least show, that as unions grow and become generally effective and recognized, strikes decrease in number. They are then in a position not only to demand arbitration, but really to get that best kind of arbitration, which consists in the meeting of the employers and the employed, both with full power to settle the question, and with the intent to do so in a reasonable way.

This brings us to the question of the settling of strikes. In so far as they come to actual disorder, I have expressed it as my opinion that they should be settled only by the ordinary course of the criminal law. In so far as a boycott is a conspiracy to do a wrongful thing, or to wrong a definite person, I think the law of criminal conspiracy is in this country adequate; but the greater and higher questions, where no such wrong is committed on both sides, where there is neither conspiracy, disorder, or intimidation, how are these real issues to be settled?

Arbitration and Conciliation.

Much has been said of courts and arbitration, and here again I have no desire to minimize their value. I believe further laws should be passed to establish them, and I hope such laws will be taken advantage of. Seven or eight of our States already have elaborate laws embodying not only a state board of arbitration and conciliation, but allowing the creation of private boards to settle special controversies in any particular trade or locality. It has been found by experience that a permanent State board is not a good body to settle trade disputes in a great bulk of the cases. Modern industries are subject both to local conditions and peculiarities of their special product and of the market for it. In the Haverhill shoe strike last winter we were told that the conditions of the Haverhill trade were so peculiar that even a body familiar with the general shoe industry, or with the shoe industry of other places, would be for that very reason incompetent to settle the questions which arose at Haverhill. That part of arbitration statutes, therefore, which provides for the mutual creation of a board chosen from among persons conversant with the particular industry is a most valuable one. And this brings us to the main point about arbitration, which is, that it is, in its essence, voluntary. I think I may state broadly that involuntary arbitration is entirely out of the

question. If the government choose, it may make arbitration compulsory upon corporations, which are its creatures; so, the United States Government, having half taken over the railroads under the Interstate Commerce Act, might wholly take them under guardianship and pass such a law as to them. There is already a general act providing for voluntary arbitration, and authorizing the President to appoint a committee of arbitrators to investigate and report. It was under this statute that Mr. Cleveland acted at the time of the Chicago riots. Mr. Wright, the United States Commissioner of Labor, has recently gone very far in the direction of recommending a statute providing even for involuntary arbitration, at least in the case of railroads. Nevertheless, until the Federal Government is willing to undertake to run the railroads of the country, and subject our already over-strained party system to the tremendous responsibility and temptation that would be imposed upon any administration by so enormously increasing the civil-service list, I believe such statutes would be unwise, probably unconstitutional, and certainly unjust, for the reason that they would be one-sided. The laborers themselves are pretty well agreed that they do not want involuntary arbitration, and they, for their part, will not submit to it. Moreover, the word "arbitration" becomes a misnomer when applied to an involuntary

proceeding. Such a proceeding differs in no particular from an ordinary suit in court. You are simply establishing a new and peculiar court with extraordinary powers which, ultimately, by practice and the precedent of its own decisions, would differ in no particular from any court now existing. There is no advantage, therefore, in involuntary arbitration; but voluntary arbitration, and, particularly, voluntary conciliation and investigation of trade disputes, is certainly a wise thing, and we can only hope that its use will increase in the future. But, after all, the best remedy is not in the arbitration, not even the conciliation of any outside party, but the fair bargaining of both sides coming together with mutual power and mutual responsibility. They may, of themselves, establish, as has frequently been done in England, special commissions of persons in the trade, who may arbitrate between them when they disagree; and this remedy when sanctioned, not created, by the State, more elastic and intelligent than any governmental creation, is the best board of arbitration after all. I believe that with the developments and improvements I have suggested in the collective labor relation, we shall find, as they have in England, that much of the need for artificial arbitration has gone by.

Trusts.

As to the question of trusts, the main interest of the laborer in them is that of the consumer. So far as trusts affect the employment relation, I am inclined to think that any powerful monopoly is, on the whole, injurious. Anything which so greatly extends the power of one side in that collective bargaining we have so often mentioned, strengthens him as against the other. It is easy to see, for instance, assuming all the cotton-mills in the country to be in one trust, how their power of black-listing could be infinitely extended. Black-listing, the prevention of laborers who have once struck from getting employment of other employers, may now be forbidden by law, and it is so forbidden in many States. If all the employers were one body, there would be no possible legal method of preventing this. Black-listing would cease to be boycotting, but merely the refusal of the employer to re-employ an employee who has voluntarily left his service by strike ; and despite the argument that may lie in the view so well expressed by Professor Jenks, it seems to me that, on the whole, the effect of monopolies is decidedly to limit the demand for labor. If all of a trade is in a monopoly, only that labor will be employed which is really necessary for the amount of output, which is really necessary or profitable. One great advantage to the laborer of independent

individualistic industries is that everybody is continually embarking in enterprises in the hope of making a profit which may never be realized, but the laborer duly gets his wages therefor. I think I can illustrate what I mean by a clear example.

The Baring Failure.

I have been told in England that the spectacle of the Baring failure had a very soothing influence upon labor agitation. It was a great object-lesson; in it the workmen of the English industrial world saw a vast sum of money, probably as much as one hundred and fifty millions of dollars, absolutely sunk by capitalists, mainly in giving employment to labor. The great bulk of the money, as was well known by them at the time, went in the prosecution of great industrial enterprises or internal improvements in several parts of the world, and the money was lost by actual count very largely in wages. Now, the State, still less a monopoly, will never attempt unprofitable enterprises. Under an individualistic system of private competition a great many more sugar refineries were running in this country than were necessary to meet the demand, but the Sugar Trust has closed many of them. Nothing is more usual than for the amount of wages paid in an enterprise to exceed the value of the total output.

It can be proved that the output of most gold-

mines does not amount to the actual money sent into the camp for working them. I have been assured that in Cripple Creek, Col. — rich as that locality is in gold — the amount of money sent into a camp in the form of supplies and money to pay labor far exceeds the value of the gold that actually goes out. In other words, mining, like many other kinds of industry, is a lottery; viewed as a whole it does not really pay. People embark their money in the hope of getting a prize, and that money goes mainly to pay the wages of labor. I hold strongly that under a system of absolute state socialism there would be far less demand for labor than there is to-day.

True Path of Progress.

In association, therefore, in collective bargaining, not in going back on all past history and giving up the contract, but by extending, strengthening, and improving it, lies, as it seems to me, the path of the future. Just as the laborer employed even by the day assumes a higher relation than the slave or serf, so the laborer employed by definite intelligent contract is in a higher relation than he; and, most of all, the laborer employed under a contract made by all the laborers of his class, made by a contracting party with power at least equal to that of the employers, greater than that of the individual employer, is in a position better still. The

Haverhill strikers last winter were said to have struck against the contract system. What they really struck against was a bad contract, which, individually, in some cases, they had not the intelligence to refuse to sign, and which, collectively, they had not the power to resist or modify. Indefinite relation is the essence of slavery. Contract is the charter of freedom. With the power to demand and the power to enforce labor contracts, for wages and for times which shall be the utmost the employer can afford to concede, and with intelligent sympathy on the part of the public, the newspaper press, and the consumer, a sympathy not blind, but anxious to support labor in its demand for a contract which is reasonable, both by public opinion and by the enactment of laws where they are indispensable, I hold that the improvement of the condition of industrial labor may make greater strides in the next century even than it has in the last, and that, without jeopardizing any right, any freedom, or any object, which we Americans hold dear.

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